Petition

81-1244

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,
Petitioners,

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. § 1988, should be proportioned to accurately reflect the extent to which a plaintiff has prevailed on the merits of his lawsuit in the District Court?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit was entered in this case on September 28, 1981. The opinion is unreported and has been attached hereto as Appendix A.

The opinion of the United States District Court for the Western District of Missouri, Central Division, was filed on January 23, 1981. The opinion was entered by

the Honorable Elmo B. Hunter, United States District Judge. The District Court order is unreported and has been attached to this brief as Appendix B. The opinion entered by Judge Hunter on the merits, which is not the subject of this petition but which is relevant to demonstrate the relative lack of success of plaintiffs, is reported at 475 F.Supp. 908 (W.D.Mo. 1979).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was filed on September 28, 1981, and mandate issued on October 27, 1981. The respondents filed their motion for attorneys' fees before the Court of Appeals on October 12, 1981. No ruling has been filed with respect to that motion. This petition for certiorari is being filed within 90 days of the date on which the judgment of the Eighth Circuit was entered. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

RELEVANT FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

Article XI, United States Constitution

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by a citizen of another state, or by citizens or subjects of any foreign state."

Title 28 U.S.C. § 1821

"(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section."

Title 28 U.S.C. § 1920

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Title 42 U.S.C. § 1988

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the

Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

The petition for writ of certiorari is directed at the opinion of the United States Court of Appeals for the Eighth Circuit filed on September 28, 1981, affirming perfunctorily and by *per curiam* opinion, the "Memorandum and Order" entered by the United States District Judge for the Western District of Missouri, Central Division, on January 23, 1981. The only order of the District Court from which the petitioner, State officials named as defendants in the District Court, sought review in the Eighth Circuit concerned the award of attorneys' fees and costs. Except as it may reflect upon the issues presented in this petition, the decision of the District Court on the merits is not the subject matter presented to this Court. The opinion of the District Court on the merits is reported as *Eckerhart* v. *Hensley*, 475 F.Supp. 908 (W.D.Mo. 1979).

This lawsuit was originally initiated in April, 1972, by the filing of a three-count complaint alleging (1) that patients at the Forensic Unit, Fulton State Hospital, were being denied their constitutional right to treatment, (2) that patients transferred to the Forensic Unit were being

denied procedural due process and (3) that patients at the Forensic Unit were entitled to compensation for their institutional-maintaining labor. The Forensic Unit is the only maximum security mental institution in the State of Missouri and serves patients out of the criminal justice system.

The original complaint was dismissed and the action was refiled on April 12, 1975, at which time only the right-to-treatment and institution-maintaining allegations remained. The procedural due process count had been made the subject of settlement. The count concerning patient labor was dismissed by the District Court on July 6, 1976. Thereafter, only allegations respecting the right-to-treatment issues remained in the case, together with all the attendant subsidiary issues concerning independent and separate conditions of treatment and confinement afforded to patients of the Forensic Unit.

The trial of this lawsuit on the merits, in the District Court, consumed approximately three weeks. In advance of trial, substantial stipulations of fact had been agreed to by the parties. The District Court accepted literally hundreds of exhibits. The plaintiffs offered ten witnesses, including five expert witnesses. The defendants offered nineteen witnesses, including five expert witnesses. Over seven years elapsed between the filing of the initial complaint in this action and the ultimate trial of this lawsuit.

The District Court entered its opinion on the merits in this matter on August 11, 1979. *Eckerhart* v. *Hensley*, 475 F.Supp. 908 (W.D.Mo. 1979). With respect to the vast majority of substantive issues addressed by the District Court in its opinion on the merits, the defendants, persons responsible for the operation of the Forensic Unit, Fulton State Hospital, and petitioners in this Court, prevailed. The plaintiffs in the District Court, respondents in this Court, were successful in obtaining limited relief with re-

spect to some of the issues which they had litigated. Throughout this lengthy litigation, the plaintiffs had challenged virtually every facet of the manner in which the defendants, both from a physical facility and programatic point of view, provided care, treatment and custody to the criminally insane population of the State of Missouri. Although most of the individual issues which plaintiffs themselves chose to litigate were easily separable for purposes of adjudication, nevertheless, the plaintiffs chose to mount a blunderbus attack on the total performance of a specific mental health facility. The several complaints filed before the District Court in this case are repleat with allegations of unconstitutional conditions and inadequate programs which allegations ultimately availed plaintiffs nothing.

Although certainly not all inclusive, Standard Pretrial Order 2, jointly filed by the parties on the morning that the trial of this matter began in the District Court, as required by Local Rule 20 of the United States District Court for the Western District of Missouri, is illustrative of the multiple factual issues litigated by plaintiffs and the extent to which they were successful. The agreed issues of fact included in that Order, filed on the morning of the first day of trial, are quoted verbatim below. The issues of fact which formed the basis of judicial relief are indicated by brackets, and, where necessary, explanatory footnotes:

> "1. Does the Biggs Building provide a humane and therapeutic physical and psychological environment?
>
> 2. [Are the living conditions and environment in the Biggs Building inhumane?][1]

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[1]The Forensic Unit consists of two inter-related units. Shortly before the trial of this case, the plaintiffs had stipulated that the physical en-

(Continued on next page)

3. Does the Forensic Unit provide more than custodial care to its patients?

4. Are the living conditions, physical and psychological environments in the Biggs Building so inadequate as to deny patients treatment and the opportunity to improve their mental condition?

5. Do the patients committed to the Forensic Unit receive adequate care and treatment to improve or give them an opportunity to improve their mental conditions?

6. Is the staff assigned to the Forensic Unit so inadequate as to render treatment impossible?

7. Are there sufficient numbers of qualified staff in the Forensic Unit to provide a minimally adequate level of treatment to the patients?

8. Are patients inappropriatedly placed in the Forensic Unit?

9. [Are patients maintained in the Forensic Unit for periods of time longer than is therapeutically necessary and thus deprived of treatment in the least re-

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Footnote continued
vironment in the Rehabilitation Unit was adequate. Therefore, the District Court took up only the physical environment prevalent in the Biggs Building. We quote:

> "Although plaintiffs' experts, as well as defendants' experts, had specific criticisms of the Biggs Building, none was willing to describe the facility generally as 'inhumane'. This Court has identified certain physical aspects of the Biggs Building that are not minimally adequate to provide the humane treatment environment required by the Constitution and will examine each in turn." 475 F.Supp. at 917.

It is extremely important to remember that, with one minor exception, every physical aspect of the Biggs Building found to be inadequate by the District Court had already been the subject of approved appropriations by the Missouri General Assembly. Petitioners do not believe that the lawsuit was responsible for those appropriations. However, that is a proper issue for the trial court on remand.

strictive environment appropriate to the individual conditions and needs]?[2]

10. Do patients have individualized treatment plans which reflect minimally adequate treatment?

11. Do patients receive individualized treatment programming?

12. [If patients do receive individualized treatment programming, is it sufficient to provide minimally adequate treatment]?[3]

13. Are patient medical files kept in such manner as to provide minimally adequate treatment?

14. Do mentally retarded and brain damaged patients have individualized habilitation plans which reflect minimally adequate treatment?

15. Do mentally retarded and brain damaged patients receive individualized habilitation programming?

16. If mentally retarded and brain damage patients do receive individualized habilitation programming, is it sufficient to provide minimally adequate treatment?

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[2]The finding of the District Court applied only to specific patients approved for transfer from the Biggs Building to the Rehabilitation Unit, the two facilities comprising the Forensic Unit which provide varying degrees of security, not to residents in the Forensic Unit generally which had been one of the main contentions of the plaintiffs' case. The District Court did not find that any patient had been retained too long in the Forensic Unit or improperly committed to that facility. *Eckerhart* v. *Hensley*, 475 F.Supp. at 922-923.

[3]Contrary to the position taken by the plaintiffs throughout the litigation in the trial court, the District Court found that the treatment plans prepared by the defendants were minimally adequate. 475 F.Supp. at 921-922. The lower court did find, however, that the defendants were unnecessarily delaying the preparation of initial treatment plans and were not providing for regular periodic reviews of the plans prepared. In effect, the District Court requested that the defendants follow their own department regulations respecting the prompt preparation of and periodic review of individualized treatment plans.

17. Are seclusions and restraints sometimes necessary in a maximum security institution?

18. Are seclusions and restraints used in a counter-therapeutic manner which is inconsistent with the goals of treatment?

19. [Do the present uses of seclusions and restraints in the Forensic Unit comprise an unreasonable danger to the physical well-being of the patients]?[4]

20. Is the manner and use of medication counter-therapeutic and inconsistent with the goals of treatment?

21. Do the present medication policies and procedures prevalent in the Forensic Unit comprise an unreasonable danger to patients?

22. Is defendants' mail policy unduely [sic] restrictive, inconsistent with the goals of treatment and counter-therapeutic?

23. [Is the Biggs Building visitation policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic]?

24. [Is the Biggs Building telephone policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic]?"

After disposition of the case on the merits, the attorneys for the plaintiffs filed documents requesting attorneys' fees and costs. The total hours claimed by counsel for the plaintiffs were 2,985.64 for a case which was tried in approxi-

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[4]The lower court found that policies and regulations regarding the use of seclusions and restraints as published by the Missouri Department of Mental Health, were sufficient to protect the rights of patients. However, that court did find that defendants were not properly documenting the use of those policy safeguards which did exist. 475 F.Supp. at 927.

mately three weeks. The only reduction in hours by the District Court was a 30% reduction in the hours claimed by one of the attorneys to reflect that attorney's failure to keep contemporaneous time records and his lack of experience. The trial court accepted plaintiffs' suggested hourly rates which were as high, for two of the attorneys, as $65.00 per hour. The trial court also awarded $6,808.29 for expert witness fees and expenses.

The hourly rates awarded to the attorneys for the plaintiffs, which varied from $40 to $65 per hour, may be held in sharp contrast to evidence produced at the hearing on attorneys' fees before the District Court which indicated that the cost to Legal Services of Eastern Missouri, Inc. of providing representation to the plaintiffs in this case, including salaries and applicable overhead, amounted to approximately $25.00 per hour.

REASON FOR GRANTING THE WRIT

The decision of the Eighth Circuit, affirming per curiam the memorandum and order of the District Court, conflicts with the decisions of other Courts of Appeals as to the proper interpretation of 42 U.S.C. § 1988 with respect to the concept of prevailing party.

The main contention of the petitioners as presented to the Eighth Circuit was that Title 42 U.S.C. § 1988 must be reasonably interpreted as requiring a district court to award attorneys' fees only to an extent fairly proportionate to the degree to which a plaintiff has prevailed. The Eighth Circuit affirmed the District Court perfunctorily without addressing that issue. We submit that petitioners had a right to expect that the Eighth Circuit would take a discernable position as to whether the attorneys' fees awarded by the District Court should have been proportioned so as to reflect accurately the relative success of the parties, especially in light of the magnitude of fees awarded. The

District Court had awarded $133,333.25 in attorneys' fees. Because of the failure of the Eighth Circuit to properly address the issue, petitioners must assume that the Court of Appeals rejected the proportionate success approach as inconsistent with its previous decisions in *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978) and *Crain* v. *City of Mountain Home, Arkansas*, 611 F.2d 726, 729 n.7 (8th Cir. 1979). Although the previous decisions of the Eighth Circuit are unpersuasive when applied to an institutional conditions case of multiple factual issues, of an individual and separate nature, litigated to ultimate disposition of a nature mostly adverse to the plaintiffs. However, the experience of petitioners' counsel at oral argument before the Eighth Circuit suggests that the appellate court was unwilling to acknowledge the distinctions between the present case and those resulting in previously adverse decisions.

The petitioners submit that the actions of the appellate court in affirming the trial court represents an entirely unreasonable application of Title 42 U.S.C. § 1988. The State of Missouri should not be required to pay $133,333.25 in attorneys' fees which will, at least in part, reward the attorneys for the plaintiffs for their failures as well as for their successes. To be generous to the plaintiffs, their attorneys were successful on substantially less than one-half of their separable and individual factual contentions respecting allegedly unconstitutional conditions at the Forensic Unit, Fulton State Hospital. For example, plaintiffs were rewarded absolutely no relief whatsoever on the issue of quantity and quality of staff. That issue was the most important in the litigation and represented, standing alone, more than one-half of the necessary attorneys' hours in preparing and presenting the case for trial.

The attorneys for the petitioners know of no other single instance, whether a case was resolved by judicial opinion or resulted in a consent degree, in which a lawsuit

challenging the conditions under which care and treatment was afforded to mental patients has met with so little success. We believe that, to a greater extent than any other mental health facility attacked by a conditions lawsuit, the facility operated by the defendants was vindicated by the District Court on the merits.

The defendants have never suggested that plaintiffs should be considered as entirely unprevailing for purposes of applying § 1988. On the other hand, the award of attorneys' fees entered by the trial court is entirely unreasonable in light of the very limited relief afforded to plaintiffs. If, in affirming the decision of the District Court perfunctorily, the Eighth Circuit was relying upon its previous decisions, then that position taken by the Eighth Circuit is contrary to the conclusions of the majority of the Circuit Courts of Appeals which have considered whether an award of attorneys' fees should be proportionate to the extent that a party has prevailed in his suit. Clearly, this is an area in which there is disagreement between the circuits.

Apparently in accord with the position taken by the trial court in this case, that once a party has been determined as having prevailed, regardless of the extent, all hours reasonably claimed should be considered in making an attorneys' fees award, are the Eighth Circuit, the Fifth Circuit and the Sixth Circuit. See *Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir. 1981); *Northcross* v. *Memphis of Education*, 611 F.2d 625, 635 (6th Cir. 1979).

The petitioners were unable to find any precedent out of the District of Columbia circuit or out of the Second Circuit relevant to this issue.

The present position of the Tenth Circuit is ambiguous. Previously, in *Pearson* v. *Western Electric Company, Western Electric Installation Organization District Office*, 542

F.2d 1150 (10th Cir. 1976), the Tenth Circuit had ruled that a prevailing Title VII plaintiffs' entitlement to attorneys' fees was proportionate to the extent of his recovery. The statutory language of Title VII concerning attorneys' fees and the language of Title 42 U.S.C. § 1988 is substantially indistinguishable. Furthermore, the legislative history of § 1988 specifies that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." Sen. Rep. No. 24-1011, U.S. Code Cong. & Admin. News p. 5912. That position was apparently reaffirmed as late as 1979 by the Tenth Circuit, in *Equal Employment Opportunity Commission* v. *Safeway Stores, Incorporated*, 597 F.2d 251 (10th Cir. 1979). However, in *Gurule* v. *Wilson*, 635 F.2d 782, 791-792 (10th Cir. 1980), the Tenth Circuit appeared to say that it was inappropriate to proportionately reduce an attorneys' fees, where the plaintiff prevails overall in the main issue in his case, for ever unsuccessful motion. The defendants submit, however, that it is clear that the Tenth Circuit still requires proportional reduction in requested attorneys' fees for time spent on unsuccessful issues. We quote from the opinion of the Tenth Circuit in *Gurule* on rehearing at page 794:

> "On consideration of the defendant's petition for rehearing with a suggestion for rehearing en banc, we believe a clarification of one part of our opinion is in order. We stated that in awarding attorneys fees to the prevailing party under 42 U.S.C. § 1988, it is inappropriate to proportionately reduce the fee for every motion where the party prevails overall on the main issue in the case. It was not out [sic] intention to suggest that a court may never proportionately reduce a requested attorneys fee for time spent on *substantial separate* issues which a plaintiff raises but on which he does not prevail. . . ." (Emphasis added)

Therefore, although the position of the Tenth Circuit may have been made somewhat ambiguous by *Gurule* v. *Wilson*, *supra*, defendants submit that said circuit must still be counted as in majority on the issue raised by the petition.

The remaining circuits are in accord with the contentions of the petitioners.

In *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978), the First Circuit did determine that plaintiffs might be considered "prevailing parties" for attorneys' fees purposes:

> "[I]f they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful. . . ." *Id.* at 279.

That court went on to caution plaintiffs to keep careful records respecting the proportionate amount of time spent on multiple issues in a lawsuit.

> "As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims." *Id.* at 279.

In *Hughes* v. *Repko*, 578 F.2d 483 (3rd Cir. 1978), the Third Circuit directed a district court to give a prevailing party credit only for hours which were reasonably supportive of successful claims and further directed that the district court should also determine whether it was reasonably necessary to spend that number of hours in order to perform the legal services for which compensation was

sought. The court pointed out that the burden to establish that the hours claimed were reasonably necessary rests on the party seeking fees.

The Fourth Circuit affirmed "in all respects" the district court's judgment in an action brought under Title 42 U.S.C. § 1981 and § 1983, *Morton* v. *Charles County Board of Education*, 373 F.Supp. 394 (D.Md. 1974); *aff'd*, 520 F.2d 871 (4th Cir. 1974). One of the factors in determining the appropriate fee, the district court in that case said, is the extent to which the plaintiff's efforts have succeeded, and time spent on claims which were not established should not be compensated. 373 F.Supp. at 411.

In *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), an action brought under § 1981 and Title VII, the Seventh Circuit held that:

> "[A]n award of attorney's fees can only be made to a prevailing party and as a general guideline the amount of the award should be proportionate to the extent that the party has prevailed in the suit. . . ."

In reversing a district court's denial of damages in a Title VII case, the Ninth Circuit in *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), directed the district court to consider the amount of fees allowed in light of the plaintiffs' partial success. The Court noted that the award should be sufficient to encourage private enforcement but "the amount of the award should also be proportionate to the extent to which the plaintiff prevails in the suit. . . ." *Id.* at 1008. The Ninth Circuit has reaffirmed the rule stated in *Schaeffer* and applied the rule to awards of attorneys' fees under § 1988. *Sethy* v. *Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979).

These conflicts between the actions taken by the Court

of Appeals and District Court in this case and the positions maintained by the majority of the Circuit Courts of Appeals justify the grant of certiorari to review these judgments.

CONCLUSION

For the foregoing reasons, petitioner requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1227

Thomas Eckerhart for himself and others similarly situated, *Appellees,* v. C. Duane Hensley (Succeeded in office by Dr. Paul Ahr, Director); James K. Rittenbusch; Henry Bratkowski; Edward Tellez, and the current members of the Missouri Mental Health Commission, *Appellants.*	Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 17, 1981

Filed: September 28, 1981

Before LAY, Chief Judge, HEANEY and ROSS, Circuit Judges.

PER CURIAM.

The Missouri Mental Health Commission appeals an award of attorney's fees under 42 U.S.C. § 1988 and costs under 28 U.S.C. § 1920. The district court, the Honorable Elmo B. Hunter, awarded fees to plaintiffs, represented by

Legal Services of Eastern Missouri, Inc., in connection with a suit challenging on constitutional grounds the conditions and treatment received by patients at the Fulton State Hospital. After conclusion of the trial on May 17, 1979, the court in *Eckerhart* v. *Hensley*, 475 F.Supp. 908 (W.D. Mo. 1979), found various violations of the eighth and fourteenth amendments and of 42 U.S.C. § 1983. In a memorandum and order filed January 23, 1981, the court found that an award of $133,333.25 in attorney's fees and $15,177.03 in costs was reasonable.

We have carefully considered the briefs, arguments and the district court memorandum and order and conclude that the court's decision is neither clearly erroneous as to its factual determinations nor mistaken as to the law as it was applied to the facts. Accordingly, we affirm pursuant to Rule 14 of the Rules of this court on the basis of Judge Hunter's memorandum and order.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Not to be published.]

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

THOMAS ECKERHART, et al., *Plaintiffs,* v. C. DUANE HENSLEY, et al., *Defendants.*	**No. 75-CV-87-C**

MEMORANDUM AND ORDER

This action now pends on plaintiffs' motion requesting both attorney's fees and the taxing of costs against defendants. Plaintiffs' base their request for attorney's fees on the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (hereinafter § 1988). The request for taxing costs against defendants is premised on 28 U.S.C. § 1920 (hereinafter § 1920). The parties have submitted written briefs regarding these issues, along with various affidavits and exhibits. Oral arguments have been completed[1] and the matter is now in a posture for the Court to rule.

This litigation has a long history involving complex constitutional issues. Suit was originally filed in April, 1972, challenging the conditions and treatment received at the Fulton State Hospital located in Fulton, Missouri. Following years of arduous pre-trial activity. Trial before this

[1]Oral arguments were conducted on October 16, 1980.

Court was commenced on April 30, 1979, and concluded on May 17, 1979. The Court's opinion followed finding various violations of the Eighth and Fourteenth Amendments and 42 U.S.C. § 1983.[2] Plaintiffs now request that, as prevailing parties under the meaning of § 1988,[3] they be awarded a reasonable attorney's fee.

Throughout this entire litigation plaintiffs have been represented by Legal Services of Eastern Missouri, Inc., (hereinafter LSEM), a non-profit legal aid organization. The bulk of this representation was conducted by three LSEM staff attorneys—Stuart R. Berkowitz, Michael Bastain, and William A. Hyde. Also participating in plaintiffs' representation was Professor Ronald Carlson of Washington University in St. Louis, Missouri. Prof. Carlson is not a full time employee of LSEM, but that organization requested his participation in the litigation due to his expertise with the Federal Rules of Evidence and his trial experience. Based on the efforts of these gentlemen in preparing and trying the lawsuit, plaintiffs request an award of $150,477.85 in attorney's fees. The requested award is broken down as follows:[4]

ATTORNEY	*HOURS*	*RATE PER HOUR*	*TOTAL*
Mr. Berkowitz	817.50	$65.00	$53,137.50
Prof. Carlson	214.75	$65.00	$13,958.75
Mr. Bastain	524.60	$50.00	$26,230.00
Mr. Hyde	1428.79	$40.00	$57,151.60

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[2]The opinion of the Court is reported at 475 F.Supp. 908 (W.D. Mo. 1979).

[3]42 U.S.C. § 1988 provides, in relevant part:

In any action or proceeding to enforce a provision of section . . . [42 U.S.C. § 1988] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[4]Plaintiffs do not request any attorney's fees for other LSEM staff attorneys, paralegals, law clerks, or support staff who also contributed time to the case.

In addition to the above claimed attorney's fees, p' . . tiffs seek the enhancement of any award by a factor of 30-50%. Also accompanying the request for attorney's fees is plaintiff's motion to tax costs in the amount of $15,177.40 against defendants.[5]

Defendants voice numerous objections to plaintiffs' requests. They challenge plaintiffs' status as a prevailing party, argue that LSEM's function as a legal aid organization should ultimately affect any award of fees, challenge the reasonableness of the fees requested, deny that any fees awarded should be enhanced finally, they claim that out-of-pocket costs should not be awarded. Each of these areas of objection will be examined.

PREVAILING PARTY

Many issues of varying magnitude were involved in this case. Because some issues were ultimately decided in favor of plaintiffs, some in favor of defendants, and some disposed of by the voluntary acts of the parties without the need for judicial intervention, the Court must consider plaintiffs' status as a prevailing party under § 1988.

Although § 1988 makes the award of attorney's fees to prevailing parties discretionary, the legislative history of the act makes it clear that this discretion should be freely exercised in favor of granting attorney's fees. Generally, a party seeking to enforce rights protected by statutes covered by § 1988, if successful, " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' Newman v. Piggie Park Enterprises,

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[5]The request for taxing costs against defendants is comprised of the following:

ITEM	*AMOUNT*
Travel, meal and lodging expenses of counsel	$5510.08
Expert fees and expenses	$6808.29
Taxable costs (depositions, xeroxing, and witness fees)	$2859.03

Inc., 390 U.S. 400, 402 (1968)." S.Rep. No. 94-1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CONG. & AD. NEWS 5912.

It is clear to the Court in this case that plaintiffs are prevailing parties under the terms of § 1988 and should be awarded a reasonable attorney's fee. No special circumstances exist which would make such an award unjust. After a full trial of the issues ultimately presented to the Court, relief was afforded plaintiffs in the areas of physical environment,[6] individual treatment plans,[7] least restrictive environment,[8] visitation and telephone privileges,[9] and seclusion and restraint practices.[10] Even though defendants prevailed on some of the issues presented to the Court, it is well settled that "a party may be considered prevailing for purposes of section 1988 attorney's fees without meeting success on every claim he has made. *Oldham* v. *Ehrlich*, 617 F.2d 163, 168 n.9 (8th Cir. 1980). As long as a party receives some of the relief requested, status as a prevailing party will not be jeopardized. *Coop* v. *City of South Bend*, No. 80-1029 (7th Cir. filed December 12, 1980) (slip opinion); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). The relief plaintiffs obtained at trial

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[6]The Court found that certain climatic conditions, lavartories, bathrooms, dormitories, furnishings, and provisions for personal belongings were not minimally adequate to provide a humane treatment environment.

[7]The individual treatment plans in existence were found to be minimally adequate but the long delay in the initial preparation of the plans and the lack of a regular review of them was found to deny plaintiffs minimally adequate treatment plans.

[8]Relief was afforded plaintiffs in this area by requiring that the problem of waiting lists for the transfer of various members of the plaintiff class to the least restrictive environment be given priority attention and an expedited solution.

[9]Conditions surrounding visitation and telephone privileges in certain parts of the institution were found to be minimally inadequate.

[10]Various conditions and procedures regarding seclusion and restraint practices were found to be minimally inadequate.

was substantial and certainly entitles them to be considered prevailing under the terms of § 1988. The relief afforded plaintiffs at trial is sufficient in itself to classify them as prevailing parties without the need of examining those issues disposed of prior to trial in order to determine which went in plaintiffs' favor.[11]

Despite the fact that plaintiffs are clearly prevailing parties under § 1988, defendants argue that any attorney's fee award should be proportionate to the extent plaintiffs prevailed. Defendants suggest that the Court should look at the total number of issues raised during the entire course of this litigation, compare that number with the issues on which plaintiffs actually prevailed at trial, and then award attorney's fees only for the actual time spent by plaintiffs on the issues on which they prevailed. The Court cannot agree with defendants' position on this issue.

> The mechanical division of claimed hours into those expended on issues which the plaintiff ultimately prevailed and those expended on issues which the plaintiff did not, with compensation given only for the former, ignores the interrelated nature of many prevailing and non-prevailing claims. *See e.g.* Smith v. Fletcher, 559 F.2d 1014, 1018 n.9 (5th Cir. 1977).

Brown v. *Bathke*, 588 F.2d 634, 637 n.5 (8th Cir. 1978). Defendants suggested method of calculating fees is based strictly on a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. Under this method no consideration is given for the relative importance of various issues, the interrelation of

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[11]However even if this lawsuit had been completely mooted by the voluntary actions of defendants prior to trial that would not have presumptively precluded plaintiffs from being considered prevailing parties under the terms of § 1988. William v. Miller, 620 F.2d 199, 202 (8th Cir. 1980).

the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues. Therefore, the Court does not find that an award of attorney's fees should be tied solely to those issues prevailed upon.[12]

LEGAL AID ORGANIZATIONS

Defendants challenge the amount of an attorney's fee award on the basis of plaintiffs' representation by a non-profit legal aid organization. They suggest that when awarding fees under § 1988 the Court should distinguish plaintiffs represented by legal aid organizations from those represented by private attorneys, and then consider this distinction as a factor in awarding fees.

This issue has recently been considered by the Eighth Circuit. For purposes of awarding attorney's fees under § 1988 there should be no distinction between plaintiffs who are represented by legal aid organizations and those represented by private attorneys.

> Although a court may consider a number of factors in arriving at a reasonable attorney's fee under 42 U.S.C. § 1988 (citing cases) we conclude it is inappropriate to consider that the prevailing plaintiff's attorney was working for a legal aid organization. The basic purpose of section 1988—to encourage enforcement and observance of civil rights—permits no distinction between private attorneys and legal aid organizations. Legal aid organizations can expand their services to indigent civil rights complaints by virtue of their receipt of attorney's fees. (footnote omitted) And a defendant sued by a plaintiff retaining legal aid counsel should not be benefited by the fortuity that the plain-

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[12]It is pertinent to note that included in the factors to be considered when awarding attorney's fees is the result obtained in the litigation. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Oldham v. Ehrlich, 617 F.2d 163, 168 (8th Cir. 1980).

> tiff could not afford private counsel. Thus, whether the focus is on enabling suit by those otherwise unable to afford litigation, or on deterring misconduct by imposing a monetary burden upon the wrongdoer, a legal aid organization merits an attorney's fee fully as much as does the private attorney. (omitting cases)

Oldham v. *Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980). This Court will not consider as a factor in awarding attorney's fees in this case the fact that plaintiffs were represented by a legal aid organization.

Defendants also argue that the Eleventh Amendment bars recovery against the State[13] of any portion of an attorney's fee award which exceeds the actual cost of representation when a legal aid organization represents plaintiffs.[14] They theorize that the non-profit orientation of a legal aid organization makes any award of attorney's fees above the actual cost to the organization a penalty, in the nature of damages, against the state, and that such violates the Eleventh Amendment.

It is clear from the pronouncements of the Supreme Court that an award of attorney's fees against a state pursuant to § 1988 is not barred by the Eleventh Amendment. *Hutto* v. *Finney*, 437 U.S. 678 (1978); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). In this case, any award to plaintiffs which properly constitutes a reasonable attorney's fee is allowable under the Eleventh Amendment. Only if a portion of the award can be characterized as something be-

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[13]Since defendants are public officials of the State of Missouri responsible for the operation and supervision of the Fulton State Hospital and members of the Missouri Mental Health Commission, any award of attorney's fees against defendants will ultimately be paid from the treasury of the state of Missouri.

[14]Defendants suggest that the actual cost of representation by a legal aid organization is measured by the salaries paid to the staff attorneys assigned to the case.

sides a reasonable attorney's fee would defendants' argument have possible merit. This leaves the Court with two questions. First, does a portion of the award to plaintiffs constitute anything besides a reasonable attorney's fee. Second, if the first question is answered in the affirmative, would that portion of the award be barred by the Eleventh Amendment.

When dealing with legal aid representation, to find that the portion of an award which exceeded the actual cost of the representation constituted a penalty against the state would require the Court to distinguish between awards made to plaintiffs represented by legal aid from awards made to plaintiffs represented by private counsel.[15] As previously noted, such a distinction is inappropriate. *Oldham* v. *Ehrlich, supra.*

For purposes of awarding a reasonable attorney's fee under § 1988 legal aid organizations and private attorneys are to be treated alike. Accepting defendants' argument would virtually require smaller attorney's fee awards to plaintiffs represented by legal aid organizations than those made to plaintiffs represented by private attorneys. Allowing defendants to so benefit by the fortuity of plaintiffs' representation by legal aid would clearly undermine the holding in *Oldham* v. *Ehrlich, supra.* Further, adopting defendants' position would require the Court to consider the cost of the representation when awarding fees to plaintiffs represented by legal aid. Consideration of the actual cost of the representation is not among the factors the Court is to consider when making an attorney's fee award. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714

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[15]Implicit in defendants' argument is the notion that it could not be raised against a plaintiff represented by a private attorney. Defendants recognize that private attorneys operate in the private sector and thus, the portion of an award to them above their actual cost represents a fair profit, not a penalty against the state.

(5th Cir. 1974). In addition, other courts have criticized the use of a cost plus method when awarding fees. *Copeland* v. *Marshall,* 23 F.E.P. 967, 978-82 (D.C. Cir. 1980).

The Court concludes that, in this case, the entire award made to plaintiffs constitutes a reasonable attorney's fee. No portion of it can be characterized as a penalty or damage award against the state of Missouri. In light of this conclusion, it is unnecessary to reach the question of whether a penalty or damage award, as described by defendants, would violate the Eleventh Amendment.

REASONABLENESS OF THE FEE

The Court has concluded that a reasonable attorney's fee should be awarded plaintiffs. It is now the Court's duty to determine the amount of the fee.

The reasonableness of an attorney's fee award should be governed by the standards set forth in *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974).[16] These standards have often been approved by the Eighth Circuit. *Zall* v. *Allamakee Community School District,* 588 F.2d 246 (8th Cir. 1978); *Brown* v. *Bathke,* 588 F.2d 634 (8th Cir. 1978); *Allen* v. *Amalgamated Transit Union Local 788,* 554 F.2d 876 (8th Cir. 1977); *Firefighters for Racial Equality* v. *City of St. Louis,* 549 F.2d 506, (8th Cir. 1977). Each of the factors set forth in *Johnson* v.

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[16]This case sets forth twelve factors to be considered when awarding attorney's fees. They are: 1) Time and labor, 2) Novelty and difficulty of the question, 3) Skill requisite to perform the legal service properly, 4) Preclusion of other employment, 5) Customary fee, 6) Whether the fee is fixed or contingent, 7) Time limitations imposed by the client or the circumstances, 8) The amount involved and the results obtained, 9) The experience, reputation, and ability of the attorneys, 10) The undesirability of the case, 11) The nature and length of the professional relationship with the client, 12) Awards in similar cases.

Georgia Highway Express, Inc., supra, will be separately considered.

Time and Labor

This case was filed in 1972 and did not come to trial until 1979. Such a lengthy period of litigation was necessary due, in large part, to the status of the case as a class action, the volume of data and evidence involved and accumulated, and the complexity of the constitutional issues presented. Trial took approximately three weeks. Despite the original filing of action in 1972, plaintiffs are only claiming attorney's fees for the period beginning January 20, 1975, when Mr. Hyde was assigned to the case, and ending approximately with the filing of post-trial briefs in 1979.

In their request for attorney's fees plaintiffs claim Mr. Hyde spent 1428.79 hours on the case during the time period he was assigned to it.[17] During this period Mr. Hyde conducted and oversaw most of the pretrial discovery and preparation that took place. Mr. Hyde was assigned this case immediately after his employment at LSEM and just a few months after his graduation from law school and admission to the bar.[18] This case was the only one assigned to Mr. Hyde, constituting 100% of his work load at LSEM. Although Mr. Hyde has submitted an affidavit detailing what he believed to be his hours spent on the case, he did not maintain contemporaneous time records during the more than four years he was working on the case.[19] While a failure to keep contemporaneous time records does not require the denial of a fee award for Mr. Hyde's time, it

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[17]Mr. Hyde was initially assigned to the case on January 20, 1975. He withdrew his appearance on March 12, 1979.

[18]Mr. Hyde graduated from St. Louis University Law School in 1974. He was assigned to the case on January 20, 1975.

[19]The affidavit consisted of a reconstruction of his hours spent on the case, all gained from a review of the case file.

is certainly a factor to be considered in awarding the fee. *Heigler* v. *Gatter*, 463 F. Supp. 802 (E.D. Pa. 1978); In *re Penn Central Securities Litigation*, 416 F. Supp. 907 (E.D. Pa. 1976); *Green* v. *Wolf Corporation*, 69 F.R.D. 568 (S.D. N.Y. 1976). This factor, coupled with Mr. Hyde's relative inexperience when assigned to the case on a full time basis, causes the Court to scrutinize the time claimed for his work with extreme care. This close scrutinization of Mr. Hyde's affidavit, his level of experience, the Court's firsthand view of this litigation and his work product, and the Court's experience with matters of a similar difficulty and scope, brings it to conclude that Mr. Hyde's claimed hours should be reduced by 30% for a total of 1000.15 hours. In the opinion of the Court, this represents a reasonable claim of time expended for Mr. Hyde's efforts.

Prof. Carlson's affidavit discloses that he spent 214.75 hours preparing for and assisting in the trial of this matter. During this time he kept detailed contemporaneous time records. A close review of those records, his role in the litigation, and the quality and nature of his work product convinces the Court that the time claimed and expended by Prof. Carlson is reasonable for a case of this type. Defendants' contention that Prof. Carlson represented a luxury on plaintiffs' trial team which defendants should not have to pay for fails to comprehend the importance and uniquences of Prof. Carlson's tactical contribution to preparation and trial. The time expended by the professor is reasonable and compensable.[20] It was not duplicative of the efforts of others.

Final preparation and trial of this case were handled

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[20]Defendants also challenge any fee award to Prof. Carlson claiming that he volunteered his services to LSEM and therefore, should not be entitled to attorney's fees. However, as the record shows, the agreement between LSEM and Prof. Carlson provides that any fee awarded for the time he expended in the case would go directly to the professor.

primarily by Mr. Berkowitz and Mr. Bastain.[21] The compensable hours claimed by these gentlemen are 817.50 hours and 524.60 hours, respectively. Much of this time was spent in trial.[22] Each maintained detailed contemporaneous time records. The Court, after a close review of the detailed time records of these two attorneys and an opportunity to view the work of both attorneys, concluded that the amount of time expended by Mr. Berkowitz and Mr. Bastain, both in trial and in non-trial activities, is reasonable. Their efforts were not duplicative of others.

Novelty and Difficulty

The Court recognizes the difficulty of this case and the novelty of many of its issues. Although it was not a case of first impression in many respects, issues such as the right to treatment made it a difficult one for all parties. The status of this case as a class action, coupled with its constitutional flavor in challenging conditions and treatment at a state institution, indeed made it an invigorating exercise for counsel.

Skill Requisite to Perform the Legal Services Properly

The Court has closely examined and observed the plaintiffs' counsels' work product, preparation and general ability. This observation has revealed a high level of skill on the part of all counsel. The quality of the legal services these attorneys provided their clients was superior in all respects.

Preclusion of Other Employment

This factor takes on somewhat of a different relevance when applied to plaintiffs represented by legal aid or-

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[21]Mr. Berkowitz began work on the case January 19, 1978. Mr. Bastain entered the litigation on February 1, 1979.

[22]Mr. Berkowitz spent 92 hours in trial and Mr. Bastain spent 108 hours in trial. These figures do not include any preparation time during the course of the trial.

ganizations. This case involved years of litigation and literally hundreds of hours. It also commanded the time and attention of an important portion of the staff of LSEM. To this extent, LSEM was precluded from pursuing other meritorious litigation. This may have meant that other public interests or clients went unrepresented.

Customary Fee

This lawsuit involved the Fulton State Hospital, a state institution located in central Missouri. It was both filed and tried in the Central Division of the United States District Court for the Western District of Missouri. Through its experience with customary fees charged by counsel in both the Western Division and the Central Division of the Western District, the Court is convinced that the hourly rates sought by plaintiffs for the work of Messrs. Hyde, Bastain, Berkowitz and Prof. Carlson are reasonable and well within the range of the customary fees charged in this area.[23] The claimed rates accurately reflect the respective abilities of counsel and are reasonable in all other respects.

Whether the Fee is Fixed or Contingent

Obviously, since plaintiffs were represented by legal aid, there was no fee arrangement between plaintiffs and their counsel. However, since they could be awarded statutory attorney's fees only if they were prevailing parties, this award is somewhat akin to a contingency fee, though it is not a traditional contingency fee that comes out of the plaintiffs' award. The results obtained by plaintiffs are not diminished or harmed by an award of fees. As a

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[23]The requested hourly rates are as follows:

Mr. Berkowitz	$65.00 per hour
Prof. Carlson	$65.00 per hour
Mr. Bastain	$50.00 per hour
Mr. Hyde	$40.00 per hour

result, this factor becomes less important when considering awards to plaintiffs represented by legal aid organizations.

Time Limitations Imposed by Clients/Circumstances

Plaintiffs were institutionalized patients located at a state hospital more than 125 miles from the office of their counsel. This factor obviously posed an expensive burden, both interms of time and resources spent. It should not be neglected when considering plaintiffs' fee request. Added to this is the fact that plaintiffs' class was comprised of mental patients, some of whom were considered dangerous, making communication between client and counsel difficult.

Amount Involved/Results Obtained

The significance of this case cannot be measured in terms of dollars and cents. It involves the constitutional and civil rights of the plaintiff class and resulted in a number of changes regarding their conditions and treatment at the state hospital. Not only should plaintiffs be considered prevailing parties, they are parties who have obtained relief of significant import. Plaintiffs' relief affects not only them, but also numerous other institutionalized patients similarly situated. The extent of this relief clearly justifies the award of a reasonable attorney's fee.

Experience, Reputation and Ability of Counsel

Plaintiffs' fee request appropriately reflects a difference in the hourly rates of the respective attorneys commensurate with their experience, reputation and ability. The Court, knowing the reputation of plaintiffs' counsel in the legal community and having had the opportunity to view their ability in the courtroom, is satisfied that the requested hourly rates and the differential between them is reasonable and consistent with their varying ex-

periences, reputations and abilities.[24] The skill of counsel was apparent throughout the litigation.

Undesirability of the Case

Plaintiffs' lawsuit was subject to many undesirable circumstances and the retention of private counsel by plaintiffs would have been difficult. The class was composed of mental patients who could not afford to retain private counsel. The logistics of the case made its prosecution burdensome. Plaintiffs were without the freedom to come and go as they pleased and located at an institution more than 125 miles from either St. Louis or Kansas City. This combination of circumstances made representation somewhat undesirable. However, the high profile and publicity afforded the trial did provide certain benefits to counsel.

Nature and Length of the Professional Relationship with the Client

According to the court in *Johnson* v. *Georgia Highway Express, Inc., supra,*:

> A lawyer in private practice may vary his fee for similar work in light of the professional relationship of the client with his office.

488 F.2d at 719. While such considerations may be true when representation is through a private attorney, they would not apply to cases where plaintiffs are represented by legal aid.

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[24]In 1979, Mr. Berkowitz was the senior staff attorney at LSEM. He was admitted to the bar in 1973 with a j.D. degree from Washington University. Prof. Carlson is the holder of a Master of Laws Degree from Georgetown University and a J.D. degree from Northwestern University. He is currently a member of the law school faculty at Washington University. Mr. Bastain was admitted to the bar in 1974 with a J.D. degree from St. Louis University. He has been employed at LSEM since 1976. Mr. Hyde was admitted to the bar in 1974 with a J.D. degree from St. Louis University.

Awards in Similar Cases

It is difficult to compare this case to other litigation for purposes of awarding an attorney's fee due to its various unique features. However, after a thorough examination of the litigation, the Court is convinced that the fee to be awarded plaintiffs is well within the range of awards made in this Circuit, as well as others, for similar cases. *Allen* v. *Amalgamated Transit Union, Local 788*, 554 F.2d 876, 884 (8th Cir. 1977); *Palmigiano* v. *Garrahy*, 466 F. Supp. 732 (D. R.I. 1979) (prison conditions litigation).

The Court has made a careful and studied review of the detailed affidavits and records submitted by plaintiffs, together with the other admissable evidence in the record, and finds the hours and rates claimed by plaintiffs reasonable in all respects, except in regard to the hours claimed by Mr. Hyde. In addition, the Court has had the opportunity to view first hand the role and conduct of the attorneys in this case. Having considered all the factors discussed an drawing upon its own experience, the Court finds that a reasonable attorney's fee should be awarded plaintiffs in the amount of $133,332.25.[25]

ENHANCEMENT OF FEES

Plaintiffs amended their initial fee request to allege that any basic attorney's fee awarded them should be considered a minimum fee which should then be enhanced by an appropriate percentage, e.g. 30-50%. In so arguing, plaintiffs rely on *Cleverly* v. *Western Electric Co., Inc.*, 450 F. Supp. 507 (W.D. Mo. 1978) aff'd 594 F.2d 638 (8th Cir. 1979). There the court awarded an attorney's fee by

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[25]

ATTORNEY	*HOURS*	*RATE PER HOUR*	*TOTAL*
Mr. Berkowitz	817.50	$65.00	$53,137.50
Prof. Carlson	214.75	$65.00	$13,958.75
Mr. Bastain	524.60	$50.00	$26,230.00
Mr. Hyde	1000.15	$40.00	$40.006.00

first calculating a minimum fee based on the number of hours spent by plaintiffs counsel valued at a customary rate. With this minimum fee in hand, the court then looked to the very factors contained in *Johnson* v. *Georgia Highway Express, Inc., supra,* to determine if the minimum fee should be enhanced. Since this Court has already taken into account the factors listed in *Johnson,* in determining what would be a reasonable fee to award plaintiffs, it would be duplicative to enhance plaintiffs' fee award by an additional amount.

OUT-OF-POCKET EXPENSES

Finally, plaintiffs request that out-of-pocket costs, in the amount of $15,177.40, be taxed against defendants. These costs include lodging, travel and meal expense for counsel and expert witnesses, expert witness fees and expenses, deposition costs, reproduction costs, and witness fees. All of the claimed costs are adequately detailed in Appendix B, attached to the affidavit of Mr. Berkowitz.

The award of such costs as claimed by plaintiffs is discretionary with the Court. 28 U.S.C. 1920. *Linneran Construction Inc.* v. *Montana-Dakota Utilities Co., Inc.,* 504 F.2d 1365 (8th Cir. 1974). None of the costs sought by plaintiffs shock the conscience of the Court. All are reasonable and adequately detailed. The Court finds that the expert witnesses called by plaintiffs at trial were indispensible and an award for their fees and expenses is reasonable.[26] *Welsch* v. *Likins* 68 F.R.D. 589 (D. Minn. 1975) aff'd 525 F.2d 987 (8th Cir. 1975). The costs of depositions, reproduction and xeroxing, and witness fees, as represented by plaintiffs, are all reasonable and under the circumstances of this litigation should be awarded as costs.[27] Although travel, lodging, and meal expenses incurred by counsel are

[26]These costs amount to $6,808.29.

[27]These costs amount to $2,859.03.

not awarded as a matter of course, in its discretion, the Court finds that the circumstances surrounding this particular case justify the taxing of these expenses as costs against defendants.[28]

For the above stated reasons, it is hereby

ORDERED that plaintiffs be awarded attorney's fees in the amount of $133,332.25; it is further

ORDERED that plaintiffs be awarded costs, taxed against defendants, in the amount of $15,177.40.

Elmo B. Hunter

SENIOR UNITED STATES DISTRICT JUDGE

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[28]These costs amount to $5,510.88.

Joint Appendix

Supreme Court, U.S.
FILED
APR 17 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1244

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,
Petitioners,

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED DECEMBER 24, 1981
CERTIORARI GRANTED MARCH 1, 1982

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No. 81-1244

IN THE

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OCTOBER TERM, 1981

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,

Petitioners,

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,

Respondents.

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

United States District Court,

Western District of Missouri

April 27, 1972	Complaint (Civil No. 1821) filed.
September 8, 1972	Amended Complaint (Case No. 1821) filed.
December 3, 1973	Judgment, Order, and Decree (Case No. 1821) filed.
April 11, 1975	Motion by Plaintiffs to Dismiss Without Prejudice, With Suggestions in Support thereof (Case No. 1821) filed.
April 14, 1975	Complaint (Case No. 75CV87-C) filed.

June 23, 1976	Motion for Voluntary Dismissal of Count II Without Prejudice, With Suggestions in Support filed.
July 6, 1976	Order Dismissing Count II of Plaintiff's Complaint Without Prejudice filed.
September 14, 1976	Defendants' Answers to Interrogatories on Financial Resources Available for Operation of the Forensic Unit Program filed.
May 31, 1977	Order Granting Ronald L. Carlson Leave to Appear of Counsel for Plaintiffs in this Cause filed.
July 20, 1977	Memorandum and Order Granting, in Part, and Denying in Part Plaintiffs' Motion for Leave to File an Amended Complaint filed.
August 3, 1977	Amended Complaint filed.
September 16, 1977	Order Certifying Cause as a Class Action Under the Provisions of Rule 23(b)(2), F.R.Civ.P. filed.
March 28, 1978	Order Granting Stuart R. Berkowitz Leave to Appear as Additional Counsel for Plaintiffs in this Cause filed.
March 2, 1979	Order Granting Michael Bastian Leave to Appear as Additional Counsel for Plaintiffs in this Cause filed.
March 5, 1979	Withdrawal of Appearance of William Hyde as attorney for plaintiffs filed.
April 27, 1979	Stipulation of Uncontraverted Facts filed.

April 30, 1979 — Full Court Trial. Present for plaintiffs: Stuart R. Berkowitz, Esq., Michael Bastian, Esq., Ronald Carlson, Esq.; for defendants: William Arnet, Esq., Michael Boicourt, Esq., Dr. James K. Ritterbusch, Supt. of Fulton St. Hosp., Dr. Hugh Shallenberger, Ass't Supt. of Treatment and Joseph Mangini, Forensic Unit Director. Standard Pretrial Order No. 2 signed by Court. The Court invokes an oral protective order covering names of patients and other matters that may come forth during this trial. No opening statements are made. Plaintiff offers exhibits. Plaintiff calls Dr. Frank Rundle. Court recesses 6:55 p.m.; to resume 9:30 a.m. 5-1-79.

May 1, 1979 — Trial resumes with above listed parties present. Additionally present for plaintiff: William Hyde, Esq.; for Defendants: Scott DeClue and Jack Baker, Fulton State Hospital employees. Plaintiff calls Steven Atkins. Portions of deposition of Dr. Henry Bratkoski read into record. Plaintiff calls Robert Atkins, Rodney Norman and Ralph D. Taylor. Court recesses 4:00 p.m.; to resume 9:30 a.m. 5-2-79.

May 2, 1979 — Trial resumes with Berkowitz, Bastain and Hyde present for plaintiffs; Boicourt, Ritterbusch, Shallenberger, Mangini and Mary Morris present for defendants. Plaintiff calls Dr. Allan

G. Barclay. Court recesses 5:25 p.m.; to resume 9:00 a.m. 5-3-79.

May 3, 1979 — Trial resumes with Berkowitz, Bastian, Carlson and Hyde present for plaintiffs; Boicourt, Arnet, Ritterbusch, Shallenberger and Mangini present for defendants. Plaintiffs call Bonnie McBride and Dr. Frank Gilner. Court recesses 4:50 p.m.; to resume 9:30 a.m. 5-4-79.

May 4, 1979 — Trial resumes with above parties present. Additionally present for defendants: David Jannick, Chief of Psychological Services, Fulton St. Hosp. Plaintiff calls Dr. Harris B. Rubin. Court recesses 3:30 p.m.; to resume 9:30 a.m. May 9, 1979.

May 9, 1979 — Trial resumes with Berkowitz, Bastian, Hyde and Carolson present for plaintiffs; Boicourt, Arnet, Ritterbusch, Shallenberger and Mangini present for defendants. Defendants call Dr. James Ritterbusch and Joseph Mangini. Court recesses 5:00 p.m. to resume 9:00 a.m. 5-10-79.

May 10, 1979 — Trial resumes with above parties present. Joseph Mangini is cross-examined. Defendants call Mary Morris, David A. Jannick and Michael A. Martin. Court recesses 5:00 p.m.; to resume 9:00 a.m. 5-11-79.

May 11, 1979 — Trial resumes with above parties present with the exception of Joseph Mangini. Defendants call William Stone,

Ray Nilges, Nollie Guerrant, Jr., Dr. Hugh Shallenberger. Plaintiffs and defendants read into record from deposition of C. Duane Hensley. Court recesses 4:25 p.m.; to resume 8:30 a.m. 5-12-79.

May 12, 1979 — Trial resumes with all parties present, including Joseph Mangini. Defendants call Dr. Jonas Rappeport and Mrs. Joan Rappeport. Court recesses 2:00 p.m.; to resume 9:30 a.m. 5-14-79.

May 14, 1979 — Trial resumes with Berkowitz, Bastian, Hyde and Carolson present for plaintiffs; Boicourt, Arnet and Ritterbusch present for defendants. Plaintiff calls Dr. Terry Brelji. Plaintiffs enter into record a portion of deposition of Dr. Alvira Brands; defendants offer into evidence remainder of this deposition. Plaintiffs enter further exhibits. Court instructs defendants to file within 5 days after conclusion of trial a time table and detailed list of planning or scheduling for physical improvements, the bringing on of additional personnel, and any substantial changes in treatment plans. Trial briefs to be submitted by each side. Court recesses 4:50 p.m.; to resume 9:30 a.m. 5-15-79.

May 15, 1979 — Trial resumes with above parties present; additionally for defendants: Shallenberger and Mangini. Defendants call Dr. Hubert A. Carbone, Patricia

	Beyer, Iris Ownes and Belinda Heimericks. Court recesses 4:00 p.m.; to resume 9:30 a.m. 5-16-79.
May 16, 1979	Trial resumes with above listed parties present for plaintiff; for defendants: Boicourt, Arnet and Ritterbusch. Defendants call Dr. Robert W. Schaeffer, Scott DeClue and Dr. Edward Tellez. Court recesses 3:10 p.m.; to resume 8:30 a.m. 5-17-79.
May 17, 1979	Trial resumes with all parties present for plaintiff with the exception of William Hyde; present for defendants: Biocourt, Arnet, Ritterbush, Shallenberger and Mangini. Defendants call Dr. Albert Glass. Deposition of Dr. C. Duane Hensley, filed. Simultaneous briefs to be filed by May 31, 1979, and reply briefs, if either side desires to file one, due June 7, 1979. Trial completed 10:30 a.m. 5-17-79.
August 11, 1979	Opinion filed.
February 26, 1980	Plaintiffs' Request for an Award of Reasonable Attorneys' Fees, Expenses and Costs filed.
February 26, 1980	Affidavit of Stuart R. Berkowitz in Support of Plaintiffs' Request for Attorneys' Fees, Expenses and Costs filed.
February 26, 1980	Affidavit of Ronald L. Carlson in Support of Plaintiffs' Request for Attorneys' Fees, Expenses and Costs filed.

April 16, 1980	Plaintiffs' Amended Request for Attorneys' Fees filed.
June 2, 1980	Order Requiring Submission of Supplemental Remedial Proposal filed.
July 17, 1980	Order filed. (Discovery is hereby reopened for the limited purpose of determination of plaintiffs' motion for an award of attorneys' fees. All such discovery must be completed on or before 8-15-80. Responses to discovery requests shall be due 15 days after service of any discovery request. No extensions of time will be granted. IT IS SO ORDERED.)
August 27, 1980	Order Regarding Remedy filed.
September 19, 1980	Order filed setting evidentiary hearing on attys' fees for Thurs. Oct. 16, 1980, 1:30 p.m. in Jeff. City, MO.
October 16, 1980	Hearing held in Jefferson City before Judge Hunter on motion for atty's fees.
January 23, 1981	Memorandum and Order awarding plaintiffs attorneys' fees in the amount of $133,332.25 and ordered that plaintiffs be awarded costs, taxed against defendants in the amount of $15,177.40.
February 20, 1981	Notice of Appeal filed.
March 31, 1981	Notice of Appeal filed.

United States Court of Appeals,
For the Eighth Circuit

April 24, 1981	Brief of Appellants filed.
May 12, 1981	Brief of Appellees filed.
September 17, 1981	Oral Argument held.
September 28, 1981	Opinion and Judgment filed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

FILED APRIL 27, 1972

EDWARD BARNES, JERRY WAYNE WADDELL, J. C. HILL and WILLIAM L. THIGPEN by their Next Friend, JAMES E. JEFFERSON; RONALD AMBACH, THOMAS ECKERHART, ROMMIE JONES, ANDREW LEE RUSH, JOSEPH NORMAN and MICHAEL OBRADOVICH, for themselves and all others similarly situated,

Plaintiffs,

v.

AUSTIN HILL, Director of the Missouri Department of Health and Welfare, GEORGE ULETT, Director of the Missouri Division of Mental Health, HAROLD ROBB, Acting Director of the Missouri Division of Mental Health, DONALD B. PETERSON, Superintendent of State Hospital No. 1, ELMER JACKSON, Director of the Biggs Building of State Hospital No. 1, DAVID SKEER, JACK STAPLETON, JR., ROBERT H. FELIX, JOHN W. McHANEY, ALBERT PRESTON, JR., HELEN TWERSKY, and ROY E. WILSON, Members of the Missouri Mental Health Commission,

Defendants.

Civil Action No. 1821
COMPLAINT

COUNT I

1. This action arises under 42 U.S.C. 1983 and 28 U.S.C. 2201 on behalf of Plaintiffs and all others similarly situated. This suit seeks to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a right, privilege or immunity secured to the Plaintiffs by the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution. Original jurisdiction of this suit is conferred upon this Court by 28 U.S.C. 1343(3)(4).

2. Plaintiffs, EDWARD BARNES, JERRY WAYNE WADDELL, WILLIAM L. THIGPEN and J. C. HILL are confined in the facilities of the Missouri Division of Mental Health by Order of the Circuit Court of the City of St. Louis, Juvenile Division, pursuant to §211.201, R.S.Mo. 1969. Plaintiff RONALD AMBACH is confined to the facilities of the Missouri Division of Mental Health by Order of the Probate Court of St. Louis County, pursuant to §202.807 R.S.Mo. 1969. Plaintiff THOMAS ECKERHART is confined in the facilities of the Missouri Division of Mental Health by Order of the Circuit Court of the City of St. Louis, Criminal Division, pursuant to §202.700 R.S.Mo. 1969. Plaintiffs ROMMIE JONES, JOSEPH NORMAN, MICHAEL OBRADOVICH, and ANDREW RUSH are confined in the facilties of the Missouri Division of Mental Health by Order of the Circuit Court of the City of St. Louis, Criminal Division, pursuant to §552.040 R.S.Mo. 1969. All Plaintiffs are now incarcerated in the maximum security building of State Hospital No. 1, Fulton, Missouri, a facility of the Missouri Division of Mental Health.

3. Plaintiffs bring this action on behalf of themselves and all other persons who are now involuntarily committed to the facilities of the Missouri Division of Mental Health for care, custody and treatment and confined in the maximum security building of State Hospital No. 1 [hereinafter referred to as the Biggs Building], under the provisions of Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure in that the class numbers more than 350 persons and the prosecution of separate actions by individual members of this class would create a risk of incompatible standards for the Defendants and would impair the ability of persons not parties to the action to protect their interests and the Defendants have acted or refused to act on grounds generally applicable to the class. The Plaintiffs will fairly and adequately protect the interests of the said class.

4. Defendant AUSTIN HILL is Director of the Missouri Department of Health and Welfare. Defendant GEORGE ULETT is Director of the Missouri Division of Mental Health within the Department of Health and Welfare. Defendant HAROLD ROBB is acting Director of the Missouri Division of Mental Health. Defendant DONALD B. PETERSON is Superintendent of State Hospital No. 1 within the Division of Mental Health. Defendant ELMER JACKSON is Director of the Biggs Building of State Hospital No. 1. Defendants DAVID SKEER, JACK STAPLETON, JR., ROBERT H. FELIX, JOHN W. McHANEY, ALBERT PRESTON, JR., HELEN TWERSKY and ROY E. WILSON constitute the Missouri Mental Health Commission. These Defendants, acting individually and in concert, are responsible under the statutes, ordinances, regulations, customs and usages of the State of Missouri for the control and operation of the Missouri Division of Mental Health, including the Biggs Building.

5. The Defendants have injured and continue to injure the Plaintiffs by means of the grossly inadequate facilities, program, personnel, medical treatment, psychiatric treatment and other unconstitutional features of the Plaintiffs' confinement in the Biggs Building.

6. Defendants have continued to operate the Biggs Building in a manner which is harmful to Plaintiffs and have failed and refused to terminate or otherwise correct such practices although there are other feasible methods of treatment that will not constitute an unconstitutional deprivation of Plaintiffs' rights.

7. All of the aforementioned acts of Defendants and injuries to Plaintiffs are in violation of Plaintiffs' constitutional rights as defined by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983.

8. As a result, the duration of the Plaintiffs' confinement has been lengthened, they have been prevented from transacting their business or earning an income, and have suffered great pain of body and mind.

9. As a direct and proximate result of the aforementioned acts and omissions of Defendants the Plaintiffs will suffer immediate, continuing and irreparable injury unless the Defendants are enjoined from continuing the involuntary confinement and other unlawful practices toward Plaintiffs and the Defendants are mandatorily enjoined to provide adequate and meaningful treatment to the Plaintiffs. Plaintiffs have no other adequate or speedy remedy for the harm and injury threatened by the Defendants.

WHEREFORE, Plaintiffs request:

a. That the Court declare Plaintiffs' right to adequate and meaningful treatment under the Fifth and Fourteenth Amendments to the United States Constitution;

b. That the Court issue a mandatory injunction compelling the Defendants to devise and implement a plan for the adequate and meaningful psychiatric treatment for Plaintiffs and all others similarly situated.

COUNT II

10. Plaintiffs reallege Paragraphs 1 through 8 as if fully set out herein.

11. Each of the Plaintiffs was committed to the Division of Mental Health or to State Hospital No. 1 by order of Court and then administratively assigned to the Biggs Building by the action of the Defendants.

12. The Defendants have acted arbitrarily and in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution in administratively assigning each of the Plaintiffs to the Biggs Build-

ing without a hearing as to the need for confinement in a maximum security facility.

13. As a direct and proximate result of the aforementioned deprivations of due process the Defendants have injured the Plaintiffs by depriving them of their liberty, placing them in a facility further from their homes and families than if they were in a non-maximum security hospital, and by virtue of both the geographical location of the Biggs Building and the rules and usages of the Biggs Building, granting fewer privileges than inmates of a non-maximum security setting or facility.

WHEREFORE, Plaintiffs request:

a. That this Court declare under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution that Plaintiffs and all others similarly situated have a right to a hearing on the issue of the necessity for maximum security confinement prior to their assignment to the Biggs Building;

b. That a mandatory injunction issue to compel the Defendants to grant the Plaintiffs an immediate administrative hearing on the issue of the suitability of Plaintiffs and all others similarly situated for confinement in the maximum security facility or in the alternative, that the Defendants be mandatorily enjoined to transfer the Plaintiffs to a non-maximum security facility.

COUNT III

14. Plaintiffs reallege Paragraphs 1 through 8 as if fully set out herein.

15. Each of the Plaintiffs have been forced to perform work assignments during their term of involuntary confinement. These work assignments are denominated "industrial therapy" but have no therapeutic value.

16. These work assignments which the Defendants have ordered the Plaintiffs to perform for the maintenance of the Hospital have great monetary value to the Defendants but the Plaintiffs have not been paid for their services.

17. As a direct and proximate result of the aforementioned compulsory work assignments the Defendants have violated the Plaintiffs' legal rights under the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution by forcing them to work without compensation.

WHEREFORE, Plaintiffs request:

a. That the Court Order the Defendants to pay damages to the Plaintiffs and all others similarly situated for the fair value of their past services, which amount should be no less than the amount computed by multiplying the number of hours worked under compulsion by the minimum wage in effect under State and Federal law at the time said services were performed;

b. That the Defendants be enjoined from compelling the Plaintiffs to perform any future work assignments or "industrial therapy" unless they consent to and are compensated for such work assignments;

c. That this Court enter an Order of Reference in this case referring it to a master for further testimony with authority to summon witnesses and require the production of books and records of the Defendants and to make and report an account of damages and profits accruing from the Defendants' violations of the Plaintiffs' rights with respect to compulsory work assignments;

d. That the Court Order the Defendants to pay the Plaintiffs' costs of this suit;

e. And for such other relief as may be just and equitable.

SIGNATURES OMITTED IN PRINTING

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

FILED SEPTEMBER 8, 1972

TITLE OMITTED IN PRINTING } **Civil Action No. 1821 AMENDED COMPLAINT**

COUNT I

1. This action arises under 42 U.S.C. 1983 and 28 U.S.C. 2201 on behalf of Plaintiffs and all others similarly situated. This suit seeks to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a right, privilege or immunity secured to the Plaintiffs by the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution. Original jurisdiction of this suit is conferred upon this Court by 28 U.S.C. 1343(3)(4).

2. Plaintiffs, EDWARD BARNES, JERRY WAYNE WADDELL, WILLIAM L. THIGPEN and J. C. HILL are confined in the facilities of the Missouri Division of Mental Health by Order of the Circuit Court of the City of St. Louis, Juvenile Division, pursuant to §211.201, R.S.Mo. 1969. Plaintiff RONALD AMBACH is confined to the facilities of the Missouri Division of Mental Health by Order of the Probate Court of St. Louis County, pursuant to §202.807 R.S.Mo. 1969. Plaintiff THOMAS ECKERHART is confined in the facilities of the Missouri Division of Mental Health by Order of the Circuit Court of the City of St. Louis, Criminal Division, pursuant to §202.700 R.S.Mo. 1969. Plaintiffs ROMMIE JONES, JOSEPH NORMAN, MICHAEL O'BRADOVICH, and ANDREW RUSH are confined in the

facilities of the Missouri Division of Mental Health by Order of the Circuit Court of the City of St. Louis, Criminal Division, pursuant to §552.040 R.S.Mo. 1969. All Plaintiffs are now incarcerated in the maximum security building of State Hospital No. 1, Fulton, Missouri, a facility of the Missouri Division of Mental Health.

3. Plaintiffs bring this action on behalf of themselves and all other persons who are now *involuntarily* committed to the facilities of the Missouri Division of Mental Health for care, custody and treatment and confined in the maximum security building of State Hospital No. 1 [hereinafter referred to as the *Biggs Building*], under the provisions of Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure in that the class numbers more than 350 persons and the prosecution of separate actions by individual members of this class would create a risk of incompatible standards for the Defendants and would impair the ability of persons not parties to the action to protect their interests and the Defendants have acted or refused to act on grounds generally applicable to the class. The Plaintiffs will fairly and adequately protect the interests of the said class.

4. Defendant AUSTIN HILL is Director of the Missouri Department of Health and Welfare. Defendant GEORGE ULETT is Director of the Missouri Division of Mental Health within the Department of Health ad Welfare. Defendant HAROLD ROBB is acting Director of the Missouri Division of Mental Health. Defendant DONALD B. PETERSON is Superintendent of State Hospital No. 1 within the Division of Mental Health. Defendant ELMER JACKSON is Director of the Biggs Building of State Hospital No. 1. Defendants DAVID SKEER, JACK STAPLETON, JR., ROBERT H. FELIX, JOHN W. McHANEY, ALBERT PRESTON, JR., HELEN TWERSKY and ROY E. WILSON constitute the Missouri Mental Health Commission. These Defendants, acting individually and in concert, are

responsible under the statutes, ordinances, regulations, customs and usages of the State of Missouri for the control and operation of the Missouri Division of Mental Health, including the Biggs Building.

5. The Defendants have injured and continue to injure the Plaintiffs by the following means:

a. Grossly inadequate facilities, including but not limited to the absence of any privacy in the dormitory and toilet areas of each ward;

b. Grossly inadequate program, including but not limited to the absence of meaningful planning for discharge of inmates;

c. Grossly inadequate personel, including but not limited to the absence of Registered Nurses to administer medication;

d. Grossly inadequate medical treatment, including but not limited to diagnosis of physical illness as psycho-somatic complaints or malingering;

e. Grossly inadequate psychiatric treatment, including but not limited to the almost total absence of individual psycho-therapy by certified psychiatrists; and

f. Other unconstitutional features of their confinement, including but not limited to the failure to segregate and protect juvenile inmates from assaults and intimidation by adult inmates.

6. The Defendants have continued to operate the Biggs Building in a manner which is harmful to the Plaintiffs, including but not limited to the allegations contained in paragraph 5 of this Complaint, and have failed and refused to terminate or otherwise correct such practices, although

there are other feasible methods of treatment, including but not limited to private bedrooms and toilets, meaningful discharge planning, qualified personnel, individual psychotherapy and segregation of juveniles.

7. All of the aforementioned acts of Defendants and injuries to Plaintiffs are in violation of Plaintiffs' constitutional rights as defined by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983.

8. As a result, the duration of the Plaintiffs' confinement has been lengthened, they have been prevented from transacting their business or earning an income, and have suffered great pain of body and mind.

9. As a direct and proximate result of the aforementioned acts and omissions of Defendants the Plaintiffs will suffer immediate, continuing and irreparable injury unless the Defendants are enjoined from continuing the involuntary confinement and other unlawful practices toward Plaintiffs and the Defendants are mandatorily enjoined to provide adequate and meaningful treatment to the Plaintiffs. Plaintiffs have no other adequate or speedy remedy for the harm and injury thereatened by the Defendants.

WHEREFORE, Plaintiffs request:

a. That the Court declare Plaintiffs' right to adequate and meaningful treatment under the Fifth and Fourteenth Amendments to the United States Constitution;

b. That the Court issue a mandatory injunction compelling the Defendants to devise and implement a plan for the adequate and meaningful psychiatric treatment for Plaintiffs and all others similarly situated.

COUNT II

10. Plaintiffs reallege Paragraphs 1 through 8 as if fully set out herein.

11. Each of the Plaintiffs was committed to the Division of Mental Health or to State Hospital No. 1 by Order of Court and then administratively assigned to the Biggs Building by the action of the Defendants.

12. The Defendants have acted arbitrarily and in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution in administratively assigning each of the Plaintiffs to the Biggs Building without a hearing as to the need for confinement in a maximum security facility.

13. As a direct and proximate result of the aforementioned deprivations of due process the Defendants have injured the Plaintiffs by depriving them of their liberty, placing them in a facility further from their homes and families than if they were in a non-maximum security hospital, and by virtue of both the geographical location of the Biggs Building and the rules and usages of the Biggs Building, granting fewer privileges than inmates of a non-maximum security setting or facility.

WHEREFORE, Plaintiffs request:

a. That this Court declare under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution that Plaintiffs and all others similarly situated have a right to a hearing on the issue of the necessity for maximum security confinement prior to their assignment to the Biggs Building;

b. That a mandatory injunction issue to compel the Defendants to grant the Plaintiffs an immediate alministrative hearing on the issue of the suitability of Plaintiffs and all others similarly situated for confinement in the

maximum security facility or in the alternative, that the Defendants be mandatorily enjoined to transfer the Plaintiffs to a non-maximum security facility.

COUNT III

14. Plaintiffs reallege Paragraphs 1 through 8 as if fully set out herein.

15. Each of the Plaintiffs have been forced to perform work assignments during their term of involuntary confinement. These work assignments are denominated "industrial therapy" but have no therapeutic value.

16. These work assignments, which the Defendants have ordered the Plaintiffs to perform for the maintenance of the hospital, have great monetary value to the Defendants because the janitorial, laundry, and kitchen work which the Plaintiffs have been forced to do are indispensable to the maintenance of the institution, and would otherwise have to be done by paid employees, but the Plaintiffs have not been paid for their services.

17. As a direct and proximate result of the aforementioned compulsory work assignments the Defendants have violated the Plaintiffs' legal rights under the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution by forcing them to work without compensation.

WHEREFORE, Plaintiffs request:

a. That the Court Order the Defendants to pay damages to the Plaintiffs and all others similarly situated for the fair value of their past services, which amount should be no less than the amount computed by multiplying the number of hours worked under compulsion by the minimum wages in effect under State and Federal Law at the time said services were performed;

b. That the Defendants be enjoined from compelling the Plaintiffs to perform any future work assignments or "industrial therapy" unless they consent to and are compensated for such work assignments;

c. That this Court enter an Order of Reference in this case referring it to a master for further testimony with authority to summon witnesses and require the production of books and records of the Defendants and to make and report an account of damages and profits accruing from the Defendants' violations of the Plaintiffs' rights with respect to compulsory work assignments;

d. That the Court Order the Defendants to pay the Plaintiffs' cost of this suit;

e. And for such other relief as may be just and equitable.

SIGNATURES OMITTED IN PRINTING

CERTIFICATE OMITTED IN PRINTING

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

FILED DECEMBER 3, 1973

TITLE OMITTED IN PRINTING

JUDGMENT, ORDER, AND DECREE

The parties to this action agree and consent to the following Judgment, Order and Decree as to Count II in this cause.

1. The plaintiffs are, or have been, confined at Fulton State Hospital, a facility of the Missouri Division of Mental Health.

2. The defendants, and their successors in office, administer the program of the Missouri Division of Mental Health, which includes Fulton State Hospital.

3. In Count II of their Amended Complaint, plaintiffs have alleged that they were each committed to the Division of Mental Health, and that the defendants then administratively assigned them for placement in the maximum security facility (Biggs Building) at Fulton State Hospital, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution by reason of the fact that there was no hearing as to the need for confinement in a maximum security facility. In their prayer for relief, plaintiffs ask for a

declaration of their right to a hearing and an injunction, on behalf of themselves and all others similarly situated, to compel the defendants to grant an immediate administrative hearing on the issue of the suitability of the plaintiffs and their class for confinement in a maximum security facility, or in the alternative, that the defendants be compelled to transfer the plaintiffs and their class to non-maximum security facilities.

4. Pursuant to Rule 23 of Federal Rules of Civil Procedure the court makes the following findings as to the class alleged in paragraphs 3 and 1 of the Amended Complaint:

(a) the class consists of all patients now confined in the Biggs Building of Fulton State Hospital and for whom the Biggs Building is the initial placement within the Division of Mental Health by administrative decision; this class numbers more than one hundred (100) persons and is so numerous that joinder of all members is impracticable;

(b) the plaintiffs' claim that they were deprived of their rights under the Due Process Clause is a question of law common to the class;

(c) the claims of the plaintiffs are typical of the claims of the class; and

(d) the representative parties will fairly and adequately protect the interests of the class.

(e) In addition, the court finds that the defendants have acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. Accordingly, the court orders that this action shall be maintained as a class action.

6. The parties have reached the following settlement to dispose of Count II of the Amended Complaint in this action:

(a) The defendants within ten days (10) after the adoption of this Order will adopt the regulations contained in the Appendix to this Order, defendants will furthermore promulgate these regulations to all superintendents and clinical directors throughout the Division of Mental Health. These regulations shall govern all initial placements to the Biggs Building by administrative decision of the Division of Mental Health after the entry of this Order.

(b) Within thirty (30) days after the entry of this Order the defendants will file with this Court and all counsel of record a complete list of all patients within the Biggs Building who were initially placed in the Biggs Building by administrative decision upon commitment or transfer pursuant to Sections 552.020, 552.040, 552.050, 475.355, 211.201.1, 211.201.2, 202.807, 202.805, 202.797, 202.730 and 195.530, Revised Statutes of Missouri.

(c) Within the same thirty (30) days the defendants will deliver to each person upon the list a copy of this Order.

(d) The list ordered in paragraph 6(b) will be divided into two (2) classes: (A) those patients whom the defendants have administrative determined are no longer in need of confinement in a maximum security facility; and (b) those patients who will be given an administrative hearing pursuant to this Order.

(e) Defendants will transfer all patients in category A to non-maximum security facilities within thirty (30) days after the filing with this court of the list ordered in paragraph 6(b). Defendants will notify the court and all counsel of record in writing of the completion of this process.

(f) Defendants, as soon as possible, will commence holding administrative hearings as defined in the Appendix to this Order as to all category B patients, beginning with those patients who have been continuously hospitalized for the longest period in the Biggs Building. These hearings will proceed at the rate of no less than ten (10) hearings per month until all patients listed pursuant to paragraph 6(b) have been transferred or a hearing afforded them.

(g) Defendants shall report to this court and all counsel of record in writing ninety (90) days after the filing of the report ordered in paragraph 6(b) as to all patients given administrative hearings, and the results thereof. Defendants will report every ninety (90) days thereafter until all hearings ordered herein have been completed.

(h) After any patient has been granted an administrative hearing, and the result of that hearing is retention in the Biggs Building, the patient will be deemed covered by the regulations contained in the Appendix to this Order.

7. The court hereby approves this settlement on behalf of the class, pursuant to Rule 23(e), F.R. Civ. Proc.

8. This Order is a final judgment with respect to the issues framed by Count II of the Amended Complaint. Since this Order does not dispose of all of the claims contained in the Amended Complaint, a Rule 54(b) Certificate is attached hereto and incorporated into this Order. The court will retain jurisdiction over this cause for the sole purpose of enforcing this Order until all steps required by this Order have been complied with.

9. Costs taxed to the defendants.

For the Defendants:

Kermit W. Almstedt
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101

For the Plaintiffs:

Richard J. Boardman
Legal Aid Society of St. Louis
5874 Delmar Boulevard
St. Louis, Missouri 63112

Frazier Baker, Local Counsel
404 Market Street
Fulton, Missouri 65251

It is so ordered.

Elmo B. Hunter
Judge

Date: December 3, 1973.

APPENDIX

REGULATION PERTAINING TO PLACEMENT OF PATIENTS IN THE MAXIMUM SECURITY FACILITY, AT THE BIGGS BUILDING, OF FULTON STATE HOSPITAL

Any patient initially placed in the maximum security facility, the Biggs Building, of Fulton State Hospital, shall be given as soon as possible, but no later than ten (10) days after the date of placement, a written notice, signed by the Superintendent of Fulton State Hospital, or his designated representative, stating the reason necessitating the placement of the patient in the maximum security facility.

The patient, whether initially placed or transferred from another facility to the Biggs Building of Fulton State Hospital, shall be informed by written notice, within ninety (90) days after the date of placement or transfer, that the patient will be afforded a staffing conference as to the necessity of the continued hospitalization of the patient in the maximum security facility. The patient shall be informed of the date, place and time of the staffing conference and that if desired a representative of his choice, such as parent, spouse, legal guardian, minister, attorney or private physician or psychiatrist, shall be permitted to attend and submit his or her comments to the staffing conference and question participants of the staffing conference relative to the necessity of continued hospitalization of the patient in the maximum security facility. The staffing conference shall be held within ten (10) days after the above provided for written notice is given the patient unless the patient requests a reasonable extension of time.

Within five (5) days after the staffing conference if, in fact, the patient is to remain hospitalized in the maximum security facility, the patient shall be given a written statement, signed by the Superintendent of Fulton State Hospital, stating the reasons necessitating the continued hospitalization of the patient in the maximum security facility. Also, a staffing conference report shall be placed in the medical files of the patient which report shall specify the particular necessity for continued hospitalization of the patient in the maximum security facility. The staffing report shall specify what available, alternative methods of hospitalization for that patient were reviewed and why any less restrictive methods were rejected. Copies of the above provided for written notices, statements and staffing report at the patient's directive shall be given to either the parent, spouse, legal guardian or attorney of the patient.

As soon as possible but no later than forty-eight (48) hours after the patient is informed of the fact that the patient is to remain hospitalized in the maximum security facility, the patient shall be given a written advisement of the patient's right to appeal that decision to the Director of the Division of Mental Health. The patient shall be advised that he has fifteen (15) days to inform the Superintendent of Fulton State Hospital or his designated representative of his intent to appeal the decision. If the patient elects to appeal the decision, within forty-eight (48) hours after the hospital is put on notice of such intent, the complete medical files of the patient shall be transferred to the Director of the Division of Mental Health, or his designated representative, who within five (5) working days after receipt of the patient's medical files shall determine if the patient is to remain hospitalized in the maximum security facility or be transferred out. During the time when the patient's medical files are before the Director of the Division of Mental Health, or his designated representative, for his determination, the patient's attorney or other proper representative, such as parent, spouse or legal guardian, shall be afforded the opportunity to submit comments on the decision to the Director.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

MOTION BY PLAINTIFFS TO DISMISS WITHOUT PREJUDICE

COME NOW, CHRISTOPHER HEXTER and JAMES W. SHERBY on behalf of the Plaintiffs and respectfully request that the Court dismiss Count I and Count III of Plaintiffs' complaint without prejudice to the bringing of another action concerning any of the matters involved therein, and upon the express condition that counsel of Plaintiffs will within a reasonable time re-file the same cause of action in a new suit. Plaintiffs move the Court to grant this request for the reasons stated in the accompanying Suggestions in support of this Motion.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT COURT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

SUGGESTIONS IN SUPPORT OF MOTION TO DISMISS WITHOUT PREJUDICE

Come now Plaintiffs, by and through their attorneys of record, and file the following suggestions in support of their motion for a voluntary dismissal of the complaint without prejudice:

1. Because this suit is a close action, pursuant to Rule 23(a), Federal Rules of Civil Procedure, it may not be voluntarily dismissed without the approval of this court.

2. Pursuant to Rule 41(a)(2), Federal Rules of Civil Procedure, this court has the power to grant Plaintiffs' request for a voluntary dismissal.

3. Because this suit has been pending for nearly three years, it is agreed by both parties that its dismissal and subsequent refiling in a now action would facilitate the proper and speedy disposition of the matters involved therein, and thereby serve the interests of both parties.

4. Pursuant to Rule 41(a)(2), Federal Rules of Civil Procedure, a voluntary dismissal of this complaint may be "upon such terms and conditions as the court deems proper".

5. It is proper in this case to make voluntary dismissal of the complaint conditional upon Plaintiffs' refiling the same cause of action in a new suit for the reasons stated above in Suggestion No. 3.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

EDWARD BARNES, JERRY WAYNE WADDELL, J. C. HILL, by their Next Friend, JAMES E. JEFFERSON; WILLIAM L. THIGPEN, RONALD AMBACH, THOMAS ECKERHART, ROMMIE JONES, ANDREW LEE RUSH, JOSEPH NORMAN, and MICHAEL OBRADOVICH, for themselves and all others similarly situated, *Plaintiffs,* v. HAROLD ROBB, Director of the Missouri Department of Mental Health, formerly Director of the Missouri Division of Mental Health and prior to that, Acting Director of the Missouri Division of Mental Health; AUSTIN HILL, formerly Director of the Missouri Department of Health and Welfare; GEORGE ULETT, formerly Director of the Missouri Division of Mental Health; DONALD PETERSON, Superintendent of State Hospital No. 1; ELMER JACKSON, formerly Director of the Biggs Building of State Hospital No. 1; FRANCES TARTAGLINO, Medical Director of the Forensic Unit of State Hospital No. 1; EDWARD R. TELLEZ, Director of the Rehabilitation Unit of State Hospital No. 1; RICHARD JACKS, Director of the Biggs Building at State Hospital No. 1; JACK STAPLETON, JR., MONTE C. THRODAHL, GEORGE LYTTON, PHILLIP R. DODGE, THE HONORABLE DONALD BURRELL, and MRS. NANCY TURNER HOWARD, Members of the Missouri Mental Health Commission; and DAVID SKEER, ROBERT FELIX, JOHN W. McHANEY, ALBERT PRESTON, JR., HELEN TWERSKY, and ROY E. WILSON, formerly Members of the Missouri Mental Health Commission, *Defendants.*	**Civil Action No. 75-CV87-C**

COMPLAINT

Preliminary Statement

1. This is an action in which the Plaintiffs, individually and on behalf of all other persons similarly situ-

ated, seek to have this Court declare unlawful and enjoin the Defendants' policies, rules, practices, and actions of acquiescing in the involuntary commitment of the Plaintiffs without providing each Plaintiff such individual treatment as will give each of them a realistic opportunity to be cured or to improve his medical condition.

Additionally, the Plaintiffs individually and on behalf of all other persons similarly situated seek to have this Court declare unlawful and award damages for injuries arising from the Defendants' past policies and actions, and practices of imposing compulsory work assignments for the maintenance of the Forensic Unit of State Hospital No. 1 without compensation.

2. Defendants' policies, rules, practices, and actions regarding the treatment of involuntarily committed patients such as the Plaintiffs are in violation of the Thirteenth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

COUNT I

RIGHT TO TREATMENT

I. *JURISDICTION*

3. This action arises under 42 U.S.C. §1983, and the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, and the Fourteenth Amendment to the United States Constitution.

4. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3).

II. *PARTIES*

5. Plaintiff RONALD AMBACH is confined to the facilities of the Missouri Department of Mental Health by order of the Probate Court of St. Louis County, pursuant

to §202.807, R.S.Mo. 1969. Plaintiff THOMAS ECKERHART is confined in the facilities of the Missouri Department of Mental Health by order of the Circuit Court of the City of St. Louis, Criminal Division, pursuant to §202.700, R.S.Mo. 1969. Plaintiffs ROMMIE JONES, JOSEPH NORMAN, MICHAEL OBRADOVICH, and ANDREW RUSH are confined to the facilities of the Missouri Department of Mental Health by order of the Circuit Court of the City of St. Louis, Criminal Division, pursuant to §552.040, R.S.Mo. 1969. Plaintiffs EDWARD BARNES, JERRY WAYNE WADDELL, J.C. HILL and WILLIAM THIGPEN were committed to the facilities of the Missouri Department of Mental Health by order of the Circuit Court of the City of St. Louis, Juvenile Division, pursuant to §211.201, R.S.Mo. 1969. Plaintiffs AMBACH, ECKERHART, JONES, OBRADOVICH, and RUSH, and WADDELL are now incarcerated in the Forensic Unit of State Hospital No. 1, a facility of the Missouri Department of Mental Health. Plaintiffs BARNES, HILL, and NORMAN were incarcerated in the Forensic Unit of State Hospital No. 1 in April, 1972, but have subsequently been discharged. Plaintiff THIGPEN was incarcerated in the Forensic Unit of State Hospital No. 1 in April, 1972, but was subsequently released pursuant to a Writ of Habeas Corpus.

6. Defendant HAROLD ROBB is Director of the Missouri Department of Mental Health, formerly Director of the Missouri Division of Mental Health and prior to that Acting Director of the Missouri Division of Mental Health. As Director, HAROLD ROBB has the following duties as set out in §202.035, R.S.Mo. 1969: to supervise the business management of the facilities in his department, to advise the Missouri Mental Health Commission as to the needs of the facilities, and through his appointed Superintendents

to administer and coordinate the medical policies, treatment programs and related matters of the facilities in his department.

7. Defendant AUSTIN HILL was Director of the Missouri Department of Health and Welfare from June 30, 1965, to December 31, 1972. As Director, AUSTIN HILL had supervisory authority over the former Divisions of Health, Mental Diseases, and Welfare and was required to set forth the duties and responsibilities of his subordinates.

8. Defendant GEORGE ULETT was formerly Director of the Missouri Division of Mental Health from December 1, 1961, to September 15, 1972. As Director GEORGE ULETT had the same duties assumed by his successor in office, Defendant HAROLD ROBB, as set out in §202.035.

9. Defendant DONALD PETERSON is Superintendent of State Hospital No. 1 located in Fulton, Missouri. As Superintendent, DONALD PETERSON, subject to the supervision of the Director of the Missouri Department of Mental Health, has complete control of State Hospital No. 1 and is required by §202.050, R.S.Mo. 1969, to give special attention to the care and health of the patients, the sanitary conditions of the buildings and environment, and other details of facility management.

10. Defendant FRANCES TARTAGLINO is Medical Director of the Forensic Unit of State Hospital No. 1.

11. Defendant ELMER JACKSON was formerly Director of the Biggs Building of State Hospital No. 1. Defendant RICHARD JACKS is Director of the Biggs Building of State Hospital No. 1. The Biggs Building serves as the maximum security facility for the Missouri Department of Mental Health.

12. Defendant EDWARD R. TELLEZ is Director of the Rehabilitation Unit of State Hospital No. 1. The Rehabilitation Unit is the facility to which patients in the Biggs Building, whose condition is deemed to have sufficiently improved are usually transferred and held prior to being released back into society. The Biggs Building and Rehabilitation Unit operate in close conjunction and are known together as the Forensic Unit.

13. Defendants JACK STAPLETON, JR., MONTE C. THRODAHL, GEORGE LYTTON, PHILLIP R. DODGE, THE HONORABLE DONALD BURRELL, and MRS. NANCY TURNER HOWARD are members of the Missouri Mental Health Commission. As Commission members, the aforementioned Defendants have the following duties as set out in §202.031, R.S.Mo. 1969: To advise the Director of the Department of Mental Health as to all phases of professional standards including patient care, training of personnel, establishment of treatment programs, obtaining adequate staff, establishment of medical and statistical records, and operation of practices in order that they be compatible with professional requirements.

14. Defendants DAVID SKEER, ROBERT FELIX, JOHN W. McHANEY, ALBERT PRESTON, JR., HELEN TWERSKY, and ROY E. WILSON were formerly members of the Missouri Mental Health Commission up to July 1, 1974, and as such had the same duties assumed by their successors in office as set out in Paragraph 13.

15. All Defendants in this action are being sued both as individuals and in their representative capacities.

III. *NATURE OF THE CLASS*

16. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pur-

suant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure.

17. The named Plaintiffs are members of a class which consists of all the persons who are now involuntarily committed or have been involuntarily committed at any time since April 27, 1970, to the facilities of the Missouri Department of Mental Health for care, custody, and treatment and are now or have been at any time since April 27, 1970 confined in the Forensic Unit of State Hospital No. 1

18. The members of the class are so numerous (600 patients or thereabouts in the Forensic Unit of State Hospital No. 1) that joining of all members is impracticable. The named Plaintiffs as the representative parties will fairly and adequately protect the interests of the entire class.

19. There are questions of law and fact common to the class and these questions of law and fact raised by the claims of the named Plaintiffs are typical of those of the class: Whether or not the Defendants' policies, rules, practices, and actions of not providing patients involuntarily committed to the Forensic Unit such individual treatment as will give each of them a realistic opportunity to be cured or improve his mental condition violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and

Whether or not the Defendants' past policies, practices and actions of imposing compulsory hospital maintenance work assignments on patients involuntarily committed to the Forensic Unit of State Hospital No. 1 without compensation violated the Thirteenth and Fourteenth Amendments to the United States Constitution.

20. Prosecution of separate actions by individual members of the class would create a risk of inconsistent or

varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants.

21. The Defendants are acting, by their carrying out of the aforementioned policies, rules, practices, and actions, in a manner generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

IV. *STATEMENT OF THE CLAIM*

22. At all times relevant herein, Defendants were acting under color of the statutes, regulations, customs, and usages of the State of Missouri and, in particular, under color of Chapter 202 of the Revised Statutes of Missouri.

23. At all times relevant herein, Defendants, both individually and collectively, knew, or should have known, of the policies, practices, acts, omissions, and conditions alleged herein.

24. The Forensic Unit of State Hospital No. 1 is a facility established by §202.020, R.S.Mo. 1969, for the care and treatment of persons afflicted with any form of mental illness or mental retardation. It is located in Fulton, Missouri, within the jurisdiction of this Court.

25. Care, treatment, custody, education, and training are all included within a broader concept referred to by mental health and mental retardation professionals as "habilitation." The goal of habilitation is to assist each mentally ill and/or retarded person to lead a life as close to normal as possible.

26. At the present time, there are approximately 600 patients in the Forensic Unit of State Hospital No. 1. All

of them, including the named individual Plaintiffs, are capable of benefiting from habilitation, but the Defendants have denied them said habilitation.

27. All of the residents in the Forensic Unit of State Hospital No. 1 have been deprived of their liberty and confined under quasi-criminal or non-criminal procedures. They are confined, ostensibly, not for punishment but for the purpose of "habilitation." Accordingly, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, their confinement is justified, if at all, only if they are in fact provided habilitation services.

28. Defendants, however, have created, fostered, and acquiesced in conditions, policies, and practices in the Forensic Unit of State Hospital No. 1 that are directly contrary to professionally accepted concepts of habilitation. As a consequence, the Forensic Unit of State Hospital No. 1 is not a therapeutic institution. It more closely resembles a prison and the residents confined therein have therefore been denied due process of law.

29. Among the conditions, policies, and practices which are directly contrary to professionally accepted concepts of habilitation, which have been created and/or acquiesced in by Defendants, and which have injured and continue to injure Plaintiffs are the following:

a. The living facilities are grossly inadequate—lacking, among other things:

i. elemental privacy in the dormitory and bathroom areas on all the wards,

ii. safe, secure places where the patients can store their personal possessions and valuables,

iii. frequently cleaned bed linen and mattresses so that some patients are forced to sleep on soiled beds,

iv. adequate ventilation during the hot weather and adequate heat during the cold weather,

v. comfortable furnishings so that the patients live in an environment almost totally devoid of lamps, sofas, comfortable chairs, pictures, rugs, magazines, books, games, and other accoutrements of normal living.

b. There are severe and arbitrary restrictions on the patients' access to the outside community including but not limited to the following:

i. unnecessarily few opportunities for socialization with women,

ii. extremely limited visitation privileges with family and friends,

iii. excessively limited and arbitrary access to grounds passes and furlough privileges,

iv. unnecessarily restrictive mail privileges that violate the patients' right to unfettered communication with the outside community.

c. The psychiatric treatment program is grossly inadequate in that among other things it does not provide for:

i. individualized treatment plans for each patient,

ii. A thorough physical and mental evaluation and diagnosis of each patient entering the hospital,

iii. adequate periodic reviews of the patients' mental health and amendments of the treatment plan in light of each patient's progress,

iv. frequent and extensive meetings between each patient and a treating psychiatrist and/or qualified psychologist in order for the patient to re-evaluate himself vis-a-vis the rest of his community both in and out of the hospital,

v. a prognosis for recovery including a date on which the diagnostic staff believes the patient can be released with the possibility that the proposed release date can be revised in light of the speed with which the treatment plan is deemed.

d. The hospital staff in the Forensic Unit is grossly inadequate in quantity and quality which results in:

i. the absence of qualified mental health personnel to prescribe and administer medication,

ii. the absence of qualified mental health personnel to perform physical, occupational, music, and art therapy with the patients,

iii. an excessive reliance by Defendants and their subordinates in the use of psychotropic drugs not as part of the patients' treatment plan, but as a form of crowd control,

iv. poor medical treatment in the areas of preventive medicine diagnostic treatment, and curative medicine. In short, the Forensic Unit fails to meet minimum constitutional standards in the following areas:

v. lacks adequately trained psychiatrists,

vi. lacks psychologists with different levels of training from Ph.D. to B.S. degrees,

vii. lacks psychiatric social workers,

viii. medical doctors,

ix. surgeons,

x. dentists,

xi. registered nurses,

xii. occupational, art, music, recreational therapists,

xiii. nurses' aides who have received adequate training in the mental health profession,

xiv. lawyers to assist the patients with their legal problems both in and out of the hospital,

e. The abysmal lack of planning for placement of the patients has resulted in weaker, juvenile, or retarded patients being subjected to assaults, homosexual and otherwise, by more aggressive patients. Patients presently have little assurance from the staff or their placement in the hospital that they will not be the victims of assaults or beatings.

f. The Forensic Unit has no special programs or trained staff for the retarded patients.

g. There are few, if any, effective vocational rehabilitation programs for the patients so that the Plaintiffs have no reasonable likelihood of survival in the labor market when discharged.

h. An inadequately planned and staffed educational program so that patients who need and desire to acquire basic skills in reading, writing, and mathematics up through patients who could benefit from college level courses are denied an opportunity to learn.

i. An excessive reliance on the arbitrary and excessive imposition of ward restrictions, seclusion, isolation, and physical restraints.

j. Little or no opportunity for the patients to make complaints regarding the physical and social conditions of the hospital and a refusal on the part of Defendants and their agents to respond affirmatively to justified complaints.

30. Because of the foregoing and other unconstitutional features of Plaintiffs' involuntary confinement to the Forensic Unit of State Hospital No. 1, the vast majority of the patients have in no way benefitted from their confinement and some have actually regressed and deteriorated since their admission.

31. The Defendants have continued to operate the Forensic Unit of State Hospital No. 1 in a manner which is harmful to the Plaintiffs, including but not limited to the allegations in Paragraph 29 of this Complaint, and have failed and refused to terminate or otherwise correct such practices, although there are many other methods of treatment which would give Plaintiffs a realistic opportunity to be cured or improve their mental condition.

32. All of the aforementioned acts of Defendants and injuries to Plaintiffs are in violation of Plaintiffs' constitutional rights to Due Process of Law as defined by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

33. As a result, the duration of the Plaintiffs' confinement has been lengthened, they have been prevented from transacting their business or earning an income, and have suffered great pain of body and mind.

34. As a direct and proximate result of the aforementioned acts and omissions of Defendants, the Plaintiffs will suffer immediate, continuing and irreparable injury unless the Defendants are enjoined from continuing the involuntary confinement and other unlawful practices

towards Plaintiffs and the Defendants are mandatorily enjoined to provide adequate and meaningful treatment to the Plaintiffs. Plaintiffs have no other adequate or speedy remedy for the harm ard injury threatened by the Defendants.

WHEREFORE, Plaintiffs respectfully request:

A. That the Court issue an order permitting this action to proceed as a class action.

B. That the Court issue a judgment declaring that the acts and omissions complained of herein violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and declaring further that the constitutional rights so violated are present rights which must immediately be respected.

C. That the Court issue a judgment declaring that the Forensic Unit of State Hospital No. 1 does not meet constitutionally minimum standards of adequate habilitation including care, treatment, education, and training.

D. That this Court receive evidence at a hearing from which it will determine, specify, and declare the constitutionally minimum standards of adequate habilitation for the patients in the Forensic Unit of State Hospital No. 1.

E. That the Court issue a preliminary injunction and, upon final hearing, a permanent mandatory injunction compelling Defendants to rectify the unconstitutional conditions, policies and practices alleged herein and to devise and implement a plan providing Plaintiffs a treatment program such as will give each of them a realistic opportunity to be cured or to improve his mental condition.

F. That the injunction the Court issues direct Defendants and their successors, agents, and employees promptly to meet such standards as this Court may specify.

G. That a receiver or master be appointed and endowed with the necessary authority to oversee and implement said orders and injunctions.

COUNT II. INVOLUNTARY SERVITUDE

35. Plaintiffs reallege Paragraphs 1 through 21 as if fully set out herein.

36. Each of the Plaintiffs have been forced to perform work assignments at some time during their term of confinement. These work assignments are denominated "industrial therapy" but have no therapeutic value. Since on or about August 1, 1974, pursuant to an administrative directive of Defendant ROBB, the Defendants have instituted a wage payment plan whereby Plaintiffs are compensated for work assignments. Under the terms of Defendant ROBB's directive, these wage payments to Plaintiffs are purported to be in strict compliance with the Fair Labor Standards Act, 29 U.S.C. §201, et seq., and the federal regulations thereunder. Due to the aforementioned directive of Defendant ROBB, this Court issued an order in *Barnes v. Hill,* CA No. 1821, on August 2, 1974, denying Plaintiffs' request for a preliminary injunction, but providing that Plaintiffs could renew their request for a preliminary injunction if Defendants modified or rescinded the directive of Defendant ROBB. At this time, Plaintiffs herein do not know the full extent of the compliance of Defendants' wage payment plan with the Fair Labor Standards Act.

37. The work assignments which the Defendants ordered the Plaintiffs to perform prior to the institution of the wage-payment plan referred to in Paragraph 36, above, were for the maintenance of the hospital, and had great monetary value to the Defendants because the janitor-

ial, laundry, kitchen and other menial work which Plaintiffs were forced to do were indispensable to the maintenance of the institution, and would otherwise have had to have been done by paid employees, but prior to the institution of the wage payment plan referred to in Paragraph 36 Plaintiffs were not paid for their services.

38. As a direct and proximate result of the aforementioned compulsory work assignments the Defendants have violated the Plaintiffs' legal rights under the Thirteenth and Fourteenth Amendments to the United States Constitution by forcing them to work without compensation.

39. In their actions in enforcing a program of compulsory work assignments, the Defendants have acted intentionally, recklessly, willfully and wantonly, and in wrongfully undertaking such actions to deprive the Plaintiffs of their rights under the Thirteenth Amendment, Defendants have acted either outside the scope of their respective offices or, if within the scope, in an arbitrary manner, grossly abusing the lawful powers of office.

WHEREFORE, Plaintiffs respectfully request:

A. That the Court order the Defendants to pay damages to the Plaintiffs and all others similarly situated for the fair value of their past services, which amount should be no less than the amount computed by multiplying the number of hours worked under compulsion by the minimum wages in effect under State and Federal law at the time said services were performed.

B. That this Court enter an Order of Reference in this case referring it to a master for further testimony with authority to summon witnesses and require the production of books and records of the Defendants and to make and report an account of damages and profits accruing from

the Defendants' violations of the Plaintiffs' rights with respect to compulsory work assignments.

C. That the Court order the Defendants to pay the Plaintiffs' costs of this suit.

D. And for such other relief as may be just and equitable.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

MOTION FOR VOLUNTARY DISMISSAL OF COUNT II WITHOUT PREJUDICE

Come now the plaintiffs, by and through their attorneys of record, and move the court that Count II of this action be dismissed without prejudice.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TITLE OMITTED IN PRINTING

SUGGESTIONS IN SUPPORT OF MOTION FOR VOLUNTARY DISMISSAL OF COUNT II WITHOUT PREJUDICE

Come now the plaintiffs, by and through their attorneys of record, and file the following suggestions in support of their motion to voluntarily dismiss Count II of this action without prejudice:

1. Pursuant to Rule 41(a)(2), Federal Rules of Civil Procedure, this court may grant plaintiffs' motion.

2. No counterclaim has been filed by the defendants to Count II.

3. This action was filed on April 11, 1975. The plaintiffs are patients committed to the Forensic Unit of Fulton State Hospital, in Fulton, Missouri. In Count I of the action plaintiffs allege that defendants, officials of Fulton State Hospital and of the Missouri Department of Mental Health, deny plaintiffs and their class their constitutional right to receive adequate care and treatment while they are confined to the Forensic Unit for the purpose of treatment. Plaintiffs seek to have the court declare their constitutional rights to receive adequate care and treatment, and further

to enjoin the defendants to implement within the Forensic Unit minimally adequate standards of care and treatment as required by the Fourteenth Amendment to the United States Constitution.

Count II of this action, however, raises an entirely different issue. In this second count, plaintiffs allege that defendants have in the past subjected them to compulsory, uncompensated work assignments while in the hospital. Plaintiffs claim that such practice was in violation of their rights, under the Thirteenth Amendment to the United States Constitution, to be free of involuntary servitude. Plaintiffs have requested relief in the form of monetary damages, and have suggested as the measure of damages an amount equal to the amount they would have received for their compulsory work assignments had they been paid for them in accordance with applicable minimum wage laws.

Insofar as any past instances where defendants may have compelled or allowed plaintiffs to perform institution-maintaing work assignments (janitorial work, kitchen work, laundry work, etc.) without compensation, plaintiffs do not concede that defendants had any legal right to do so. Nor do plaintiffs concede that their claim in Count II is barred by the Eleventh Amendment to the United States Constitution (See "Plaintiffs' Memorandum Of Law On The Applicability Of The Eleventh Amendment To Plaintiffs' Claim For Damages In Count II," filed in this case May 29, 1975).

However, it is the opinion of plaintiffs' attorneys, after studying recent case law developments, that the claim for monetary relief under the Thirteenth Amendment theory pleaded in Count II probably would not be maintainable as a class action, and would present unacceptably difficult problems of proof. At the same time, plaintiffs and their attorneys have concluded that a more appropriate legal

theory for monetary redress of the wrongs alleged in Count II, and one which would not pose the same problems of proof and class action maintainability, would be an action for back wages under section 216(b) of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* The following paragraphs, it is hoped, will more fully explain why it is felt this conclusion is justified.

Count II was filed as a class action. It was never certified as such, nor have plaintiffs ever formally moved the court for an order certifying Count II as a class action (although plaintiffs have moved this court for an order certifying Count I as a class action—see "Motion To Proceed As Class Action" and "Suggestions In Support Of Motion To Proceed As Class Action", filed in this case on April 29, 1975). Unlike Count I, which seeks only prospective declaratory and injunctive relief, Count II seeks monetary damages for individual members of the class, and therefore if Count II were certified as a class action it would have to be as a Rule 23(b)(3) class action.

Most relevant case law seems to indicate that, to be entitled to recover damages in such an action for violation of their Thirteenth Amendment rights, two critical elements which plaintiffs would have to prove would be: (1) that the work they performed was, in fact, involuntary, and (2) that the work they performed was non-therapeutic. See, e.g., *Johnson v. Henne* 355 F.2d 129 (2d. Cir. 1966). *Dale v. State of New York*, 44 A.D. 384, 355 N.Y.S. 2d 485 (1974). Since both the question of voluntariness of work performed as well as the question of therapeutic benefit of work performed would probably involve varying fact situations with respect to each different member of the class, and since Rule 23(b)(3) requires by its terms that common questions of law and fact "predominate" over individual questions, it therefore seems likely that plaintiffs' Thirteenth Amendment claim cannot be main-

tained as a *class* action. Just as importantly, the case of *Dale v. State of New York, supra,* demonstrates that even in the case of an individual patient, the problems of proof in showing that various particular work assignments performed at the hospital over a period of years were both non-therapeutic and involuntary would be quite difficult and complex, if not impossible.

By way of contrast, if the plaintiffs were to maintain a claim under the Fair Labor Standards Act seeking essentially the same type of relief as sought in Count II, it would appear that they would not have to prove that their work assignments were either non-therapeutic or involuntary, but would merely have to show that their work had "consequential economic benefit" to Fulton State Hospital, and was not compensated. *Souder v. Brennan,* 367 F.Supp. 808 (1973); *The Mentally Handicapped Citizen And Institutional Labor,* 87 *Harv. L. Rev.* 567, 573-74.

With this opinion of the disadvantageousness of the Thirteenth Amendment as a theory for plaintiffs and their class to seek monetary recovery for the wrongs alleged in Count II, and the apparent superiority of the Fair Labor Standards Act as an alternative theory under which the plaintiffs could seek the same type of relief, counsel for plaintiffs sought to amend their Complaint by adding such a claim under the Fair Labor Standards Act. (See plaintiffs' proposed Amended Complaint, "Request For Leave To File Amended Complaint", and Suggestions in Support, filed in this case on August 14, 1975). This court denied that request. (See Memorandum and Order Granting In Part And Denying In Part Plaintiffs' Motion For Leave To Amend Complaint filed in this case on November 10, 1975). The court's November 10, 1975 order indicates that it denied plaintiffs' request to amend by adding the claim under the Fair Labor Standards Act, not on any ground that such claim would be legally insufficient, but rather

because the court in its sound discretion felt that granting the request would make an already very difficult lawsuit too complicated and unmanageable.

In retrospect, the plaintiffs fully agree with the court's finding as expressed in its November 10, 1975 Memorandum and Order. It *would* have made this lawsuit unmanageably burdensome and complex to have added the Fair Labor Standards Act claim. By the same token, if the court now grants this motion, it will make this lawsuit less complicated and allow the parties to focus all of their efforts on the only remaining issue, the right-to-treatment claim. Furthermore, essentially the same Fair Labor Standards Act claim which the court denied plaintiffs permission to add to this action has now been filed as a separate action, styled *Eckerhart v. The Missouri Department of Mental Health*, No. 76CV 73-C.

Thus, since the legal theory which would offer the best chance of any recovery for the kinds of acts alleged and complained of in Count II has now been incorporated into a separate lawsuit on behalf of the same plaintiff-class, no substantial prejudice will result to the interests of the patients in the Forensic Unit at Fulton State Hospital by the dismissal of Count II of this action.

4. Defendants' attorney, Assistant Attorney General Michael Boicourt, has indicated to plaintiffs' attorneys that he will have no objection to this motion to dismiss Count II without prejudice.

SIGNATURES OMITTED IN PRINTING

CERTIFICATE OMITTED IN PRINTING

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

FILED JULY 6, 1976

TITLE OMITTED IN PRINTING

ORDER DISMISSING COUNT II OF PLAINTIFFS' COMPLAINT WITHOUT PREJUDICE

Upon plaintiffs' motion and without opposition of defendants, Count II of plaintiffs' complaint is hereby dismissed without prejudice.

IT IS SO ORDERED.

ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

FILED SEPTEMBER 14, 1976

TITLE OMITTED IN PRINTING

DEFENDANTS' ANSWERS TO INTERROGATORIES ON FINANCIAL RESOURCES AVAILABLE FOR OPERATION OF THE FORENSIC UNIT PROGRAM

Come now the defendants in the above-captioned legal proceeding, and pursuant to Rule 33, Federal Rules of Civil Procedure, respectfully submit their answers to the "Interrogatories on Financial Resources Available for Operation of the Forensic Unit Program."

INTERROGATORY NO. 1

1. Following July 1, 1976, has more money been made available to fund the operation of the Forensic Unit program?

ANSWER TO INTERROGATORY NO. 1

1. Yes.

INTERROGATORY NO. 2

2. If the answer to No. 1, above, is yes, please specify in detail how much more money has been made available, as compared with before July 1, 1976, to fund the operation of the Forensic Unit program.

ANSWER TO INTERROGATORY NO. 2

2. The funding for all operations of the Fulton State Hospital has been increased three percent (3%) for the fiscal year 1976. The Forensic Unit is included in these operations. There has been no increase specifically marked for the Forensic Unit only.

INTERROGATORY NO. 3

3. Please state the name, and job category, of any professional employee who has been hired to work either full-time or part-time in either the Biggs Building or Rehabilitation Unit since May 21, 1976.

ANSWER TO INTERROGATORY NO. 3

3. *Name*	*Job Category*
Kirk A. Chandler	Medical Extern
Louise Camblin	Psy. Soc. Worker I
Araminta Smith	Psy. Soc. Worker Supv. I
Gregory Jones	Clinical Psychologist (½ time)
Araminta Smith	Psy. Soc. Work Supv. Consultant

INTERROGATORY NO. 4

4. Please state whether you have knowledge of any plans or expectations for Fulton State Hospital in the next few months to hire any additional professional employees to work either full-time or part-time in the Forensic Unit.

ANSWER TO INTERROGATORY NO. 4

4. Yes.

INTERROGATORY NO. 5

5. If the answer to No. 4, above, is yes, please state the anticipated number of staff additions in each job category for which staff additions are planned or anticipated in the

Forensic Unit, and approximately when it is anticipated or planned that such prospective additions to staff will begin employment.

ANSWER TO INTERROGATORY NO. 5

5. One psychiatrist is scheduled to begin work in October, 1976. One general physician is being hired at the present time and will begin work immediately. One extern, who will serve as a general physician, will begin work on September 1, 1976.

The Governor approved an increase of thirty-six (36) physicians for the fiscal year of 1976; however, the legislature did not allocate funds for the approved positions in the fiscal year 1976. We plan to seek legislative funding for these approved positions for the fiscal year 1977. If said funding were approved by the legislature, the additional positions would include three psychiatrists, one general physician, twenty psychiatric aids, four graduate nurses, one clinical psychologist, one occupational therapist, one recreational therapist, two clinical casework assistants, and three psychiatric social workers.

INTERROGATORY NO. 6

6. Please state the names of any Forensic Unit professional staff who have terminated their employment at Fulton State Hospital since May 21, 1976.

ANSWER TO INTERROGATORY NO. 6

6. *Name*	*Job Category*
Kirk A. Chandler	Medical Extern
Rohides Patil	Physician General (Part-time)
David Stagner	Medical Extern
William Vernon	Medical Extern
Katarickd OOmmen	Physician I (General)
Araminta Smith	Psy. Soc. Work Supv. I (still part-time consultant)

INTERROGATORY NO. 7

7. Please state whether there have been any salary increases for any professional or sub-professional Forensic Unit staff since May 21, 1976, and if so, the amounts of the old and new salaries.

ANSWER TO INTERROGATORY NO. 7

7. *Salary Increase*	*Merit System Position*
$3,088.58 to $3,134.92	Clinical Director Psychiatry
$2,532.08 to $2,578.42	Physician III General
$970.00 to $1,015.00	Psychiatric Soc. Work I
$1,162.00 to $1,216.00	Psychiatric Soc. Work II
$1,162.00 to $1,216.00	Grad. Nurse VI
$970.00 to $1,015.00	Clinical Psych. I

INTERROGATORY NO. 8

8. Please state whether there are any salary increases planned or scheduled to go into effect for any professional or sub-professional Forensic Unit staff, and if so, about when such salary increases will go into effect and how much the increases in salary will be.

ANSWER TO INTERROGATORY NO. 8

8. We anticipate that there will be a five percent (5%) increase in salaries for all employees of the Fulton State Hospital starting June, 1977, plus another five percent (5%) increase for some employees based on merit and longevity.

INTERROGATORY NO. 9

9. Please state whether, apart from any recent or anticipated additions to staff or salary increases, you have knowledge of any other changes or improvements in the Forensic Unit which have either taken place or are planned to take place as a result of increased budget appropriations,

such as, but not limited to, physical remodeling, purchase of new equipment, or an end of the "drug holidays" which you referred to in your May 21, 1976 deposition.

ANSWER TO INTERROGATORY NO. 9

9. Yes.

INTERROGATORY NO. 10

10. If the answer to No. 9, above, is yes, please describe in detail such changes or improvements as have already gone into effect or started.

ANSWER TO INTERROGATORY NO. 10

10. The Hospital has purchased $18,000.00 worth of new furniture. The maximum security wards will receive first choice of this furniture.

INTERROGATORY NO. 11

11. If the answer to Interrogatory No. 9 is yes, please describe in detail such changes or improvements as are planned to go into effect at a later time, including about when it is expected they will go into effect.

ANSWER TO INTERROGATORY NO. 11

11. The Hospital anticipates funds to effect an upgrading of the utility system in the Biggs Unit for the fiscal year 1977. This will include the heating and cooling system.

ANSWER TO INTERROGATORY NO. 12

12. Please state whether, on July 3, 1976, most of the treatment plans for patients in the Biggs Building were located in the place in the patient's medical records where such treatment plans are usually kept.

ANSWER TO INTERROGATORY NO. 12

12. Yes. However, some were not.

INTERROGATORY NO. 13

13. If, on July 3, 1976, many or most of the treatment plans referred to above were located elsewhere than the place where they are usually kept in the patient's medical files, where were such treatment plans located and why were they not located where they normally would be?

ANSWER TO INTERROGATORY NO. 13

13. All treatment plans for patients in the Biggs Building were removed from patient medical records where they are usually kept during the first week in May, 1976, for inspection and copying by the Legal Aid Society in St. Louis as requested by Rule 34 motion. Most of the plans were returned to their respective records immediately after the inspection. However, due to a clerical error, the plan for Wards B-1, B-3 and B-7 were not refiled until a routine check by the team assigned to those wards discovered their absence from patient records. These treatment plans were refiled during the first week of July, 1976.

SIGNATURES OMITTED IN PRINTING

CERTIFICATE OMITTED IN PRINTING

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

RECEIVED JUNE 6, 1977

ATTORNEY GENERALS OFFICE

TITLE OMITTED IN PRINTING

ORDER GRANTING RONALD L. CARLSON LEAVE TO APPEAR OF COUNSEL FOR PLAINTIFFS IN THIS CAUSE

Upon motion, and for good cause shown, Ronald L. Carlson is hereby granted leave to enter his appearance in this cause "Of Counsel" on behalf of plaintiffs.

IT IS SO ORDERED.

RICHARD H. RALSTON
UNITED STATES MAGISTRATE

Dated this 31st day of
May, 1977, at Kansas City,
Missouri.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

MEMORANDUM AND ORDER GRANTING, IN PART, AND DENYING, IN PART, PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

This is an action brought by plaintiffs, persons who are involuntarily confined in the Missouri State Hospital No. 1 at Fulton, Missouri, on behalf of themselves and others similarly situated, under the provisions of the Civil Rights Act, Section 1983, Title 42, United States Code, to obtain declaratory and injunctive relief with regard to the conditions of their confinement and treatment at that institution. The parties, by stipulation of March 21, 1977, have agreed upon a class definition for the purposes of Rule 23, F.R.Civ.P., which includes "all patients involuntarily confined to the Forensic Unit, Fulton, State Hospital on such date as the Court may render any judgment disposing of allegations raised by the plaintiffs, or any portion thereof . . . regardless of age, race, diagnosis, or statutory type of commitment," and which excludes certain other specific types of patients who are committed to the Hospital. The cause is presently before the Court upon plaintiff's motion for leave to amend their complaint, filed on February 18, 1977, pursuant to the provisions of Rule 15(a), F.R.Civ.P. The parties have submitted suggestions and counter-suggestions concerning the proposed amendment and the issue is now ripe for determination.

In their suggestions in opposition to plaintiffs' request for leave to file an amended complaint, filed March 4, 1977, defendants specifically object to the following proposed changes in plaintiffs' complaint, although defendants allude to certain other changes which they apparently deem objectionable, but concerning which they present no particularized objections: (1) the inclusion of allegations of denials of rights to adequate treatment secured under the Eighth Amendment and Equal Protection Clause of the Fourteenth Amendment of the Constitution where before plaintiffs set forth claims solely under the Fifth Amendment and Due Process clause of the Fifth Amendment of the Constitution; (2) a change in the allegations of the plaintiffs' class to include juveniles; (3) the inclusion of certain "new duties and responsibilities with respect to four of the defendants"; (4) the inclusion of new definitions of terms concerning plaintiffs' allegations of new definitions of terms concerning plaintiffs' allegations concerning inadequacy of the staff of the institution; (5) the inclusion of "entirely new and different allegations concerning adequacy of treatment within the Forensic Unit" of the Fulton State Hospital as set forth in Paragraphs 22 through 33 of plaintiffs' proposed amended complaint; (6) the addition of claims under the First, Fourth, Sixth, Ninth, and Fourteenth Amendments with regard to plaintiffs' mailing and visitation privileges; and (7) the addition of a prayer for attorneys' fees. With respect to these proposed changes in the complaint herein, defendants urge that such amendments should not be allowed because of the delay such amendments would cause in the processing of this cause, an action which is already almost five-year-old, and the prejudice which will inure to defendants by the interjection of new and additional issues in this cause. Plaintiffs, on the other hand, contend that the proposed amended complaint does not interject any new issues into the action and that it constitutes merely a more precise definition of alternative legal

theories, which would be available to them in any event, and a more specific definition of terms.

The legal standards in determining the propriety of an amendment following protracted proceedings in an action are relatively clear. Under the provisions of Rule 15(a), F.R.Civ.P., "leave to amend shall be freely given when justice so requires." And, as indicated by the Supreme Court in *Foman* v. *Davis*, 371 U.S. 178 (1968), the standard should be applied in the following manner:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'. *Id.* at 182.

Thus, unless there is a clear indication that plaintiffs' proposed amendments would prejudice defendants or would unduly protract an already protracted case, leave to amend should be granted.

The Class Action Definition

While, at the time plaintiffs' motion to amend was originally filed, the parties were in dispute as to whether or not plaintiffs should be allowed to redefine their class action allegations to include certain juveniles, counsel for the parties have advised the Court that the stipulation of March 21, 1977, as to a defined class has resolved this controversy. Therefore, since there is no dispute between the parties as to the definition of the class of persons repre-

sented in this cause, plaintiff should and will be represented in this cause, plaintiff should and will be allowed to amend their complaint to set forth this agreed definition.

Allegations Setting Forth Theories of Recovery For Inadequate Treatment Under the Eighth Amendment And the Equal Protection Clause of the Fourteenth Amendment and Theories of Recovery For Restrictions Upon Mailing and Visitation Privileges Under The First, Fourth, Sixth, Ninth, and Fourteenth Amendments

The problem raised by plaintiffs' request to amend their complaint with regard to their allegations of inadequate treatment is similar, if not identical, to that presented in connection with plaintiffs' request to amend their complaint regarding mailing and visitation privileges. Essentially, plaintiffs desire to amend their allegations to include additional and specific alternative legal grounds to support their broader claims of inadequate psychiatric treatment and unduly restrictive mailing and visitation privileges. Apparently, through discovery or otherwise, plaintiffs have recognized alternative constitutional grounds for these claims which they previously overlooked or of which they were unaware.

In the interest of justice, plaintiffs should be allowed to amend to include these alternative legal theories. Although defendants broadly allege that they will be prejudiced by the failure of plaintiff to include allegations concerning these constitutional grounds in their initial complaint, it is difficult to perceive exactly how defendants will be prejudiced or how the inclusion of these alternative theories will prolong the proceedings in this action since the underlying factual basis of these claims is substantially identical, regardless of the theory proposed.

For example, plaintiffs have already alleged that they, and members of a class similarly situated, receive inadequate treatment, specifically deliniating the manner in which the treatment which they presently receive is deficient. Since a claim of a denial of equal protection would involve a showing of discrimination toward a class due to inadequate treatment by institutional authorities, it would appear that substantially the same factual showing would be involved in proof of the equal protection claim as would be involved in the due process claim of denial of adequate treatment to the alleged class. Similarly, it does not appear that plaintiffs' proposed allegations as to visitation and mailing rights would substantially alter the factual grounds for these claims. Where originally plaintiffs alleged that defendants had established "unnecessary restrictive mail privileges that violate the patients right to unfettered communication with the outside community" and "extremely limited visitation privileges with family and friends," they now seek to allege that such activities violate their rights to "freedom of speech, privacy, and access to legal counsel, under the First, Fourth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution." While this amendment substantially broadens the legal theories upon which plaintiffs rely, it does not appear to significantly alter the factual basis of those claims. Accordingly, under the circumstances, and in light of the theory of federal notice pleading, plaintiffs should be allowed to amend their complaint to include these broadened legal theories, particularly since defendants do not specifically describe the manner in which they would be prejudiced by the amendment should it be allowed. This allowance of the addition of alternative legal theories comports with the underlying purposes of federal notice pleading. The theory of federal pleading envinces a belief that "when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim

at the pleading stage," as long as a belated shift in the thrust of the case does not prejudice the defense. 6 Wright Miller, Federal Practice and Procedure §1219, p. 145 (1969). See also: Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974). If defendants, by motion, can precisely indicate additional discovery which is necessary to the defense of this action by the inclusion of these alternative legal theories, full consideration will be given to a limited period for such discovery.

Addition of New Duties
As to the Four Named Defendants

In their suggestions in opposition to plaintiff's motion for leave to amend, defendants contend that "[i]n describing the defendants, the new proposed complaint alleges new duties and responsibilities with respect to four of the defendants three of which [sic] were not named as defendants in the original complaint." With two exceptions, a review of plaintiffs' proposed amended complaint does not substantiate defendants' contentions in this regard. First, with regard to the parties to this action, it appears that plaintiffs propose to drop several of the originally-named defendants and merely to substitute successors in office as named defendants. For example, C. Duane Hensley, current Director of the Missouri Department of Mental Health is substituted for Harold Robb, the former Director; James K. Ritterbush, Superintendent of the Fulton State Hospital, is substituted for Donald Peterson, former Superintendent; Henry Bratkowski, Clinical Director of the Biggs Building of the Fulton State Hospital, is substituted for Richard Jacks, the former Director; Frances Tartaglino is dropped as a party defendant; and the individually-named members of the Missouri Mental Health Commission are now named in their official capacity only. Thus, with regard to the parties defendant in this cause, it appears that plaintiffs'

proposed amendment would simplify and update the original complaint in this action. A comparison of the original complaint with the new proposed amended complaint indicates that, with two exceptions, plaintiffs have merely simplified the recital of their duties, rather than adding allegations with regard to new duties of which defendants did not have notice. The two exceptions are: (1) the addition of averments with regard to the alleged arbitrary denial of transfers of patients from Biggs Building at the Fulton State Hospital to the Rehabilitation Unit at the hospital, and (2) the addition of allegations with regard to "a lack of sufficient number of clerical and secretarial personnel." These factual allegations were not originally contained in plaintiffs' initial complaint in this action and they constitute the addition of claims with entirely new factual basis, upon which discovery clearly has not been obtained by defendants. Thus, it would appear that the addition of these claims would necessitate additional discovery, the scope of which is not presently clear. In light of the already protracted nature of this case, the complexity of the issues, the volume of discovery which has already occurred herein, and the expense to defendants of the additional discovery, plaintiffs' request to include these new factual claims will not be granted. See, generally: 6 Wright & Miller, Federal Practice & Procedure §1487, (1971) (setting forth the considerations in denying leave to amend).

Addition of A Prayer For Attorney's Fees

Since the initiation of this action, Congress has amended Section 1988, Title 42, United States Code, to authorize the payment of attorney's fees where a party prevails in a Civil Rights Action. The relevant part of Section 1988, as amended by Public Law 94-559, October 19, 1976, reads as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Plaintiffs' proposed amended complaint seeks to include a prayer for attorney's fees so as to clearly indicate that plaintiffs will seek such fees if they prevail in this action. Defendants oppose this amendment on the grounds that "an award of attorneys fees would result only in the transfer of funds from one public funded agency to another" and that "the funds available to defendants could be best put to use in improving the treatment of patients within the Forensic Unit, Fulton State Hospital." This argument clearly goes to the ultimate propriety of awarding attorney's fees and not to the question of whether or not plaintiffs should be allowed to amend their complaint to include such request in their prayer. As stated by Judge Clark in *Gins* v. *Mauser Plumbing Supply Company*, 148 F.2d 974 (2nd Cir. 1945) at page 976:

> [T]he demand for judgment loses its restrictive nature when the parties are at issue, for particular theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not.

Thus, even if plaintiffs had not included a prayer for attorney's fees in their complaint, it would appear that such an award of attorney's fees, if warranted under the circumstances and under Section 1988, could be made by the Court following a determination of the substantive issues of this cause favorable to plaintiffs. Accordingly, it is difficult to see how defendants can or will be prejudiced by an amendment of the plaintiffs' prayer for relief to include an award of attorney's fees. Therefore, plaintiffs should and will be allowed to make such amendment.

For the reasons stated above, and pursuant to 28 U.S.C. §636, it is therefore

ORDERED that plaintiffs should be, and hereby are, granted leave to amend their complaint in this cause within 15 days of this date upon the above-stated terms.

RICHARD H. RALSTON
UNITED STATES MAGISTRATE

Dated this 20th day of July, 1977, at Kansas City, Missouri.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

RECEIVED AUGUST 3, 1977

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, and MICHAEL O'BRADOVICH, for themselves and all other persons similarly situated, *Plaintiffs,* v. C. DUANE HENSLEY, Director of the Missouri Department of Mental Health, and his successors in office; JAMES K. RITTERBUSH, Superintendent of Fulton State Hospital, and his successors in office; HENRY BRATKOWSKI, Clinical Director of the Biggs Building at Fulton State Hospital, and his successors in office; EDWARD TELLEZ, Clinical Director of the Rehabilitation Unit at Fulton State Hospital, and his successors in office; and the current MEMBERS of the MISSOURI MENTAL HEALTH COMMISSION, and their successors in office, *Defendants.*	Civil Action Number: 75CV87-C

AMENDED COMPLAINT

Preliminary Statement

1. This is an action in which plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this Court declare unlawful and enjoin certain policies and practices of the defendants, which plaintiffs allege cause their involuntary confinement without providing them adequate treatment for their mental illness.

COUNT I

Right To Treatment

I. *Jurisdiction*

2. This action arises under 42 U.S.C. §1983; the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; and the Eighth and Fourteenth Amendments to the United States Constitution.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3).

II. *Parties*

4. Plaintiff THOMAS ECKERHART is confined to the facilities of the Missouri Department of Mental Health by order of the Circuit Court of the City of St. Louis, pursuant to §202.700-770 RSMo. (1969). Plaintiff RONALD AMBACH is confined to the facilities of the Missouri Department of Mental Health by order of the Probate Court of St. Louis County, pursuant to §202.807 RSMo. (1969). Plaintiffs ROMMIE JONES and MICHAEL O'BRADOVICH are confined to the facilities of the Missouri Department of Mental Health by order of the Circuit Court of the City of St. Louis, pursuant to §552.040 RSMo. 1969). Plaintiffs ECKERHART, AMBACH, JONES and O'BRADOVICH are now involuntarily committed to and confined in the Forensic Unit at Fulton State Hospital. The Forensic Unit consists of the Biggs Building and the Rehabilitation Unit, which operate in close conjunction and are known together as the Forensic Unit. The Biggs Building serves as the maximum-security facility for the Missouri Department of Mental Health, and the Rehabilitation Unit is the less restrictive facility to which patients in the Biggs Building are usually transferred and held prior to being released back into society.

5. Defendant C. DUANE HENSLEY is Director of the Missouri Department of Mental Health. The Missouri Department of Mental Health is an agency of the State of Missouri, was created by the Omnibus State Reorganization Act of 1974 as successor to the former Missouri Division of Mental Health, and is responsible under Missouri laws for the management of state mental hospitals and facilities, including Fulton State Hospital. As Director, defendant HENSLEY has the following duties as set out in §202.035 RSMo. (1969): to supervise the business management of the facilities in his department, to advise the Missouri Mental Health Commission as to the needs of the facilities, and through his appointed superintendents to administer and coordinate the medical policies, treatment programs, and related matters of the facilities in his department.

6. Defendant JAMES K. RITTERBUSH is Superintendent of Fulton State Hospital, located in Fulton, Missouri. Fulton State Hospital is a facility of the Missouri Department of Mental Health, for the treatment of mentally ill and mentally disabled persons. As Superintendent, JAMES RITTERBUSH has control and management of Fulton State Hospital, subject to the supervision of the Director of the Missouri Department of Mental Health, and is required by §202.050 RSMo. (1969), to give special attention to the care and health of the patients, the sanitary conditions of the buildings and environment, and other details of facility management.

7. Defendant HENRY BRATKOWSKI is Clinical Director of the Biggs Building at Fulton State Hospital, and in general has administrative control over, and direct operational supervision of the care and treatment of patients in the Biggs Building.

8. Defendant EDWARD TELLEZ is Clinical Director of the Rehabilitation Unit at Fulton State Hospital, and

in general has administrative control over, and direct operational supervision of, the care and treatment of patients in the Rehabilitation Unit.

9. Defendant MEMBERS of the MISSOURI MENTAL HEALTH COMMISSION are charged with the following duties under §202.031, RSMo. (1969): to advise the Director of the Department of Mental Health as to all phases of professional standards, including establishment of medical and statistical records, patient care, training of personnel, establishment of treatment programs, obtaining adequate staff, and operation of practices in order that they be compatible with professional requirements.

10. All defendants in this action are sued only in their official capacities.

III. *Nature Of The Class*

11. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated, pursuant to Rule 23(a) and (b), Federal Rules of Civil Procedure.

12. The named plaintiffs are members of a class which consists of all persons who are covered by the parties' "Joint Stipulation" setting forth a class, which was jointly filed by the parties in this cause on or about March 19, 1977, and which is incorporated by reference as if fully set forth herein.

IV. *Statement Of The Claim*

13. At all times relevant herein, defendants acted and continue to act in their official capacities and under color of state law.

14. At the present time, there are approximately 350 patients in the Forensic Unit. All of them, including the named plaintiffs, need and are capable of benefitting from adequate treatment.

15. None of the residents of the Forensic Unit are confined there by reason of having been found guilty of a criminal offense. None of the residents of the Forensic Unit are confined there for the purpose of punishment. All of the residents of the Forensic Unit, except those who are only briefly and temporarily confined for purposes of pre-trial psychiatric evaluation, are ostensibly confined there for the purpose of treatment.

16. Defendants, however, have created, fostered, or acquiesced in conditions, policies, and practices in the Forensic Unit that deprive plaintiffs and their class of adequate treatment. Among such conditions, policies, and practices, are those set forth below in Paragraphs *17* through *28* of this Complaint.*

17. There is a serious shortage of staff personnel in the Forensic Unit, in the following areas:

(a) a lack of a sufficient number of psychiatrists and physicians;

(b) a lack of a sufficient number of psychologists with different levels of training from Ph.D. to B.S. degrees;

(c) a lack of a sufficient number of psychiatric social workers;

(d) a lack of a sufficient number of professional nurses, including registered nurses;

(e) a lack of sufficient number of psychiatric nurses' aides who have received adequate training in the mental health profession;

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* All allegations stated in Paragraphs *17* through and including Paragraph *28* of this Complaint and which refer to "the Forensic Unit" apply to both the Biggs Building and Rehabilitation Unit; but those allegations in paragraphs which only mention the Biggs Building do not apply to the Rehabilitation Unit.

(f) a lack of a sufficient number of qualified occupational therapists and recreation therapists; and

(g) an inadequately staffed educational program.

18. An individualized written treatment plan, carefully designed and tailored to meet the specific needs and problems of the individual patient, is an essential component of adequate treatment. The so-called treatment plans for patients in the Forensic Unit are generally deficient in many ways. They are usually written without a qualified psychiatrist actually taking part in their formulation. They are usually unreasonably vague and non-specific in their statement of the patient's problems, the methods of treatment to be employed, the goals of treatment, and the identity of the individual staff persons assigned to carry out the patient's treatment. They usually lack altogether some elements which are essential to adequate treatment, such as a clearly stated rationale for the plan, and modifications to the plan in the light of patient's progress or lack of it. And here have been, and there continues to be, instances of unreasonable delay between the time a patient is admitted and the time a treatment plan for him is formulated and implemented.

19. Regular, frequent, and scrutinous review of patients' progress along the path of treatment is essential in order for adequate treatment to be maintained. Adequate review of patients' progress is not provided in the Forensic Unit. Clinical staffings for patients are held far too infrequently, nor is there adequate periodic review of patients' individual treatment plans, and amendments to those plans in the light of each patient's progress.

20. There is in the Forensic Unit an absence of a sufficient number of qualified personnel to prescribe and administer medication. There is also an excessive reliance upon the use of psychotropic drugs, not as part of the patient's treatment plan, but as a form of crowd control.

21. In the Biggs Building, patients are often placed in seclusion (solitary confinement in a small, locked room) as a means of controlling or attempting to control their behavior. Seclusion is employed in the Biggs Building for, among other reasons, disciplinary reasons, infractions of institutional rules, and types of alleged misbehavior which would be likely to result in the similar solitary confinement of an individual in a prison setting.

22. When physicians on the staff of Fulton State Hospital authorize placement in seclusion or continuation of seclusion for patients in the Biggs Building, they usually do not see the patient concerned, in order to evaluate firsthand the need for the patient's seclusion or continued seclusion, before signing the seclusion orders.

23. The use of seclusion in the Biggs Building is generally excessive, arbitrary, and inadequately documented.

24. Many patients in the Forensic Unit suffer from mental retardation.

25. The Forensic Unit lacks adequate specifically trained and qualified staff, special education and habilitative programs for those patients who are mentally retarded.

26. Living facilities for patients in the Biggs Building are grossly inadequate. They lack, among other things, elemental privacy in the dormitory and bathroom areas on all wards. There is inadequate cooling of air temperatures during the hot summer months, and inadequate heating during the cold weather. There is a lack of comfortable furnishings, so that patients live in an environment almost totally devoid of lamps, sofas, comfortable chairs, pictures, rugs, and other accoutrements of normal living.

27. Patients in the Biggs Building suffer severe and arbitrary limitations and restrictions on their rights to visit with family and friends.

28. In the Biggs Building, the limitations upon patients' mail and telephone privileges are severe, arbitrary and unnecessarily restrictive.

29. The aforementioned policies, practices, and conditions of confinement, as set forth above in Paragraphs 13 through 28, deprive plaintiffs and their class of rights guaranteed them under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

30. The aforementioned policies, practices, and conditions of confinement, as set forth above in Paragraphs 13 through 28, deprive plaintiffs and their class of rights guaranteed them under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

31. The aforementioned policies, practices, and conditions of confinement, as set forth above in Paragraphs 13 through 28, in effect amount to punishment of plaintiffs and their class for a status or condition of mental illness which they cannot help, and thereby subject them to cruel and unusual punishment in violation of their rights under the Eighth Amendment to the United States Constitution.

32. The unnecessarily restrictive mail and telephone privileges, as alleged in Paragraph 28, above, which restrictions include but are not limited to the rigid censorship of nearly all outgoing mail and the opening of patients' incoming mail from courts and attorneys outside of the patient's presence, in addition to denying plaintiffs' constitutional right to adequate treatment as alleged above, also deprives plaintiffs and their class of rights guaranteed them under the First, Fourth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution.

33. Defendants have deprived plaintiffs and their class, and continue to deprive them, of their constitutional right to receive adequate treatment for their mental illnesses. Defendants have operated and continue to operate the Fo-

rensic Unit of Fulton State Hospital in an unconstitutional manner, as alleged in Paragraphs 13 through 32 of this Complaint; and defendants have failed to terminate or otherwise correct such practices.

34. As a direct and proximate result of the aforementioned practices of defendants and conditions of confinement in the Forensic Unit, plaintiffs and their class have suffered a massive violation of their civil rights. Plaintiffs have no adequate or speedy remedy at law, and will continue to suffer irreparable injury unless the defendants are enjoined from continuing those conditions of confinement, and mandatorily enjoined to implement minimum constitutional standards of care and treatment throughout the Forensic Unit.

V. *Prayer For Relief*

WHEREFORE, plaintiffs respectfully request:

A. That the Court issue an order permitting this action to proceed as a class action.

B. That the Court receive evidence at a hearing, from which it will determine, specify, and declare constitutionally minimum standards of treatment for the patients in the Forensic Unit at Fulton State Hospital.

C. That the Court issue a judgment declaring that plaintiffs and their class have a constitutional right to minimum standards of care and treatment under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as under the Eighth Amendment to the United States Constitution; that the Forensic Unit does not meet constitutionally minimum standards of care and treatment; and that the constitutional rights so violated are present rights which must be immediately respected.

D. That the Court issue a preliminary injunction, and, upon final hearing, a permanent mandatory injunction, directing the defendants, and their agents, employees, and successors in office, to rectify the unconstitutional conditions herein, and to implement the minimum standards of care and treatment to which plaintiffs and their class are constitutionally entitled.

E. That the Court appoint a Special Master with the duty and authority to oversee the initial implementation of the Court's said orders and injunctions.

F. That the Court order the defendants to pay the plaintiffs' costs of this suit and reasonable attorneys' fees.

G. And for such other relief as may be just and proper.

SIGNATURES OMITTED IN PRINTING

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

RECEIVED SEPTEMBER 20, 1977

TITLE OMITTED IN PRINTING

ORDER CERTIFYING CAUSE AS A CLASS ACTION UNDER THE PROVISIONS OF RULE 23(b) (2), F.R.Civ.P.

On March 21, 1977, the parties, by stipulation, agreed to a definition of a class for the purposes of certification of a class action herein pursuant to the provisions of Rule 23(a) & (b) (2), F.R.Civ.P., and they have agreed to the maintenance of this cause as a class action under Rule 23(b) (2), F.R.Civ.P. Based upon that stipulation, the Report and Recommendation of the United States magistrate of March 22, 1977, and the independent finding of the undersigned United States district judge from the files and records herein, it is clear that this cause should be maintained as a class action in that the following requirements of Rule 23, F.R.Civ.P., are satisfied: (1) the class is so numerous that joinder of all members is impracticable, (2) there are numerous questions of law and fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5)

the plaintiffs allege herein that defendants have acted or refused to act on grounds generally applicable to the class.

The parties have stipulated to the following facts with regard to the definition of the class:

> The parties jointly agree and stipulate that the class represented by the plaintiffs named in paragraph 17, *supra*, shall include all patients involuntarily confined to the Forensic Unit, Fulton State Hospital on such date as the Court may render any judgment disposing of all allegations raised by the plaintiffs, or any portion thereof. Should the Court, by a judgment, grant any declaratory and injunctive relief to the plaintiffs, the class affected would consist only of patients confined on the date of the judgment.
>
> The class includes all persons who fall within its description regardless of age, race, diagnosis, or statutory type of commitment; and because the claims of all class members are sufficiently similar in spite of any individual differences which may exist in age, race, diagnosis, or statutory type of commitment, there are no conflicts of interest which would require the creation of any separate sub-classes along any of those lines. Accordingly, plaintiffs will be permitted to represent the claims and interests of all members of the class, including members who might fall into age groups, races, diagnoses, or statutory types of commitment different from those of the individually-named plaintiffs.
>
> With particular reference in patients who are 17 years of age or younger, plaintiffs will not maintain any special allegation with respect to them as would require the creation of a separate sub-class, but such juvenile patients will be included in the class repre-

sented. Plaintiffs will be permitted to maintain claims and present evidence as to all issues or allegations raised by their action which would pertain to juveniles just as such issues or allegations would pertain to other members of the class, including, but not limited, inadequate professional treatment staff, inadequate number of psychiatric aids, inadequate educational programs, improper use of seclusion, etc. Should the Court grant plaintiffs' motion to amend their complaint, or allow any part of the plaintiffs' proposed amended complaint to supersede the present complaint in this matter, the parties agree that paragraph 29 of plaintiffs' proposed amended complaint, which makes distinct allegations and prays for unique relief on behalf of juvenile patients, should be stricken. Accordingly, it is not intended that Will Thigpen be a class representative in this matter.

Patients in the Forensic Unit who are there only temporarily for purposes of pretrial psychiatric observation and evaluation are not confined for the purpose of treatment, and therefore, are not included in the definition of the class.

Patients in the Forensic Unit who are there solely pursuant to Section 202.783, RSMo 1969, and not by one of them, are released or transferred from the Fotarily confined and, therefore, are not included in the definition of the class.

In the event that plaintiff-representatives AMBACH, ECKERHART, JONES and OBRADOVICH, or any one of them, are released or transferred from the Forensic Unit, after certification of this action as a class action before judgment is rendered, each of them will be allowed to continue to represent the claims of the

class, even though their individual claims shall have become moot.

The definition of the class agreed to herein shall not be construed to prevent plaintiffs, in an attempt to prove their class claims, from introducing evidence as to the treatment (or lack of treatment) afforded to persons who were patients in the Forensic Unit at some time during the pendency of this action, but who were not patients there at the time of trial, or evidence as to the relative amount of staff time devoted to those patients who are there only for pre-trial evaluation. Such evidence shall not be objected to on the ground that it relates to persons who are not members of the class, but defendants may raise objections to its competency, relevancy, or any other evidentiary objections they wish to have the Court consider.

Pursuant to the provisions of Rule 23, F.R.Civ.P., and based upon the stipulation of the parties, the Report and Recommendation of the United States magistrate, dated March 22, 1977, and the records and files herein, it is therefore

ORDERED that the above-styled cause be maintained as a class action under Rule 23(b) (2), F.R.Civ.P. It is further

Ordered that the class represented by the plaintiffs shall include all patients involuntarily confined to the Forensic Unit, Fulton State Hospital on such date as any judgment may be rendered herein disposing of all allegations raised by the plaintiffs, or any portion thereof. It is further

ORDERED that should a judgment granting declaratory or injunctive relief be rendered in favor of plaintiffs,

the class affected will consist only of patients confined on the date of such judgment. It is further

ORDERED that the class includes all persons who fall within its description, as set forth above, regardless of age, race, diagnosis, or statutory type of commitment. It is further

ORDERED that patients in the Forensic Unit who are there only temporarily for purposes of pretrial psychiatric observation and evaluation are not confined for the purpose of treatment, and therefore, are not included in the defined class. It is further

ORDERED that patients in the Forensic Unit who are there solely pursuant to Section 202.783, RSMo. 1969, and not by any court order, are not included in the defined class.

ELMO B. HUNTER
United States District Judge

Dated this 16th day
of September, 1977
at Kansas City, Missouri.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

ORDER GRANTING STUART R. BERKOWITZ LEAVE AS ADDITIONAL COUNSEL FOR PLAINTIFFS IN THIS CAUSE

Upon motion, and for good cause shown, Stuart R. Berkowitz is hereby granted leave to enter his appearance in this cause as additional counsel on behalf of plaintiffs.

IT IS SO ORDERED:

RICHARD H. RALSTON
UNITED STATES MAGISTRATE

Dated this 28th day of
March, 1978, at Kansas
City, Missouri.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

ORDER GRANTING MICHAEL BASTIAN LEAVE TO APPEAR AS ADDITIONAL COUNSEL FOR PLAINTIFFS IN THIS CAUSE

Upon motion, for good cause shown, Michael Bastian is hereby granted leave to appear as additional counsel on behalf of plaintiffs in this cause.

ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE

Dated this 2nd day of
March, 1979 at Kansas City,
Missouri.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

RECEIVED MARCH 5, 1979

TITLE OMITTED IN PRINTING

WITHDRAWAL OF APPEARANCE

I wish to withdraw my appearance as counsel for plaintiffs in the above-entitled cause of action.

I am currently engaged in the private practice of law and have not been actively involved in this litigation since leaving employment with Legal Services of Eastern Missouri, Inc., (LSEM), on November 15, 1978. Since then I have and will continue to volunteer a small amount of my time to LSEM in connection with the case. However, my other priorities do not allow me to play any further active role in the case.

LSEM staff attorneys, Stuart R. Berkowitz and Michael Bastian, as well as Washington University School of Law Professor Ronald Carlson, will remain as attorneys of record for the plaintiffs, and the adequacy of plaintiff class' representation thus will in no way be diminished by my withdrawal of appearance.

SIGNATURES OMITTED IN PRINTING

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

STIPULATION OF UNCONTRAVERTED FACTS

I.

General Background Information Regarding the Forensic Unit at the Fulton State Hospital

1. The Forensic Unit at Fulton State Hospital consists of two residential units, one known as the Marion O. Biggs Building for the Criminally Insane, and the other known as the Rehabilitation Unit. The Biggs Building is also known as the Maximum Security Unit.

2. The Biggs Building is the only unit of the Missouri Department of Mental Health housing solely maximum security patients.

3. The Biggs Building is intended to house patients who, in addition to being mentally ill or mentally disabled, have been deemed to be dangerous to themselves or others to an extent which requires that their care and treatment be conducted under conditions which provide maximum security.

4. The Rehabilitation Unit also is intended to house patients who have been determined to represent a danger to themselves or others. Generally, the confinement of patients in the Rehabilitation Unit is conducted under conditions of less security than prevails in the Biggs Building.

5. All the patients in the Forensic Unit at Fulton State Hospital are males.

6. Patients in the Forensic Unit at the Fulton State Hospital are allowed to have their own clothing, and if they do not have their own clothing, clothing is provided to them by the Hospital.

7. Exhibit A attached to this Stipulation is a true and correct copy of the current visitation regulations applicable to the Biggs Unit at the Fulton State Hospital.

8. Exhibit B attached to this Stipulation is a true and correct copy of the current visitation regulations applicable to the Rehabilitation Unit at the Fulton State Hospital.

9. Exhibit C attached to this Stipulation is a true and correct copy of the current telephone regulations applicable to the Biggs Unit at the Fulton State Hospital.

10. Exhibit D attached to this Stipulation is a true and correct copy of the current telephone regulations applicable to the Rehabilitation Unit at the Fulton State Hospital.

11. Exhibit E attached to this Stipulation is a true and correct copy of the current seclusion and restraints policy applicable to the Biggs Unit and the Rehabilitation Unit at the Fulton State Hospital.

12. The Biggs Unit contains ten permanent wards which are designated Biggs 1, Biggs, 2, Biggs 3, Biggs 5, Biggs 6, Biggs 7, Biggs 8, Biggs 9, Biggs 11, and Biggs 12.

13. The Rehabilitation Unit contains four wards which are designated 2 South, 3 South, 6 South and 10 South.

II.

Marion O. Biggs Building

A. Physical Environment

14. The visitor's waiting room in the Biggs Building measures 28'9" by 18'10" (541 square feet).

15. The visiting room in the Biggs Building measures 49'6" by 14'9" (730 square feet). The visiting room has a capacity for 15 visitors (30 seats).

16. The library in the Biggs Building measures 20'9" by 13'9" (285 square feet).

17. The canteen in the Biggs Building measures 53'7" by 15'0 (804 square feet).

18. The dining hall at the Biggs Building is a large room serviced by a cafeteria-style serving line. Four man tables are provided for the patients. Three meals a day are served in the dining hall. Nursing service personnel on duty also eat there.

19. The dining hall in the Biggs Building is serviced by a kitchen.

20. The Parties agree that the dietary facilities at the Biggs Building are adequate.

21. The following are the pertinent measurements for the patient wards in the Biggs Building at the Fulton State Hospital:

1. Biggs 1

    a. Dayroom—32′3″ by 32′0″ (1032 square feet).

    b. Nurses Station—12′0″ by 7′5″ (89 square feet).

    c. Clothing room—12′0″ by 9′5″ (113 square feet).

    d. Bathroom—12′0″ by 9′5″ (113 square feet). The bathroom contains three commodes separated by 41″ high partitions, and three lavatories.

    e. Shower room—12′0″ by 10′8″ (128 square feet). The shower room contains two showers and one bathtub.

    f. Siderooms—12′0″ by 7′4″ (88 square feet). There are six siderooms on Biggs 1.

    g. Dormitory—45′3″ by 31′0″ (1403 square feet). There are 14 cubicles in the dormitory on Biggs 1 containing 25 beds.

2. Biggs 2

    a. Dayroom—32′3″ by 32′0″ (1032 square feet).

    b. Nurses Station—12′0″ by 7′5″ (89 square feet).

    c. Clothing room—12′0″ by 9′5″ (113 square feet).

    d. Bathroom—12′0″ by 9′5″ (113 square feet). The bathroom contains three commodes separated by 40″ partitions, and three lavatories.

e. Shower room—12'0" by 8'6" (102 square feet). The shower room contains two showers and one bathtub.

f. Siderooms—12'0" by 7'4" (88 square feet). There are six siderooms on Biggs 2.

g. Dormitory—45'0" by 31'4" (1409 square feet). There are fourteen cubicles in the dormitory on Biggs 2 containing 28 beds.

3. Biggs 3

a. Dayroom—32'3" by 32'0" (1032 square feet).

b. Nurses Station—12'0" by 7'5" (89 square feet).

c. Clothing room—12'0" by 9'5" (113 square feet).

d. Bathroom—12'0" by 9'5" (113 square feet). The bathroom contains three commodes separated by 40" high partitions, and three lavatories.

e. Shower room—12'0" by 10'8" (128 square feet). The shower room contains two showers and one bathtub.

f. Siderooms—12'0" by 7'4" (88 square feet). There are six siderooms on Biggs 3.

g. Dormitory—45'0" by 31'4" (1409 square feet). There are 14 cubicles in the dormitory on Biggs 3 containing 28 beds.

4. Biggs 4. Biggs 4 is a temporary patient living area which is used as a "swing ward" when major renovation is taking place on one of the permanent wards in the Biggs Unit. At the present time the patients from Ward 12 (Program II) are temporarily residing on War while their ward is being repainted.

a. Dayroom—3'23" by 32'0" (1032 square feet).

b. Nurses Station—12'0" by 7'6" (90 square feet).

c. Clothing room—12'0" by 9'5" (113 square feet).

d. Bathroom—12'0" by 9'7" (115 square feet). The bathroom contains three commodes and three lavatories.

e. Shower room—12'0" by 8'9" (105 square feet). The shower room contains two showers and one bathtub.

f. Siderooms—12'0" by 7'4" (88 square feet). There are six siderooms on Biggs 4.

g. Dormitory—44'0" by 31'2" (1372 square feet). There are 14 cubicles in the dormitory on Biggs 4 containing 21 beds.

5. Biggs 5

a. Dayroom—32'3" by 32'0" (1032 square feet).

b. Nurses Station—12'3" by 12'0" (147 square feet).

c. Clothing room—12'0" by 9'5" (113 square feet).

d. Bathroom—11'10" by 9'7" (114 square feet). The bathroom contains three commodes separated by 39" high partitions, and three lavatories.

e. Shower room—11'10" by 8'6" (100 square feet). The shower room contains two showers and one bathtub.

f. Siderooms—There are seven siderooms measuring 12′4″ by 7′3″ (89 square feet), and ten siderooms measuring 12′5″ by 8′9″ (108 square feet).

g. There is no dormitory located on Biggs 5.

6. Biggs 6

a. Dayroom—32′3″ by 32′0″ (1032 square feet).

b. Nurses Station—12′3″ by 12′0″ (147 square feet).

c. Clothing room—12′0″ by 9′5″ (113 square feet).

d. Bathroom—11′10″ by 9′7″ (114 square feet). The bathroom contains three commodes separated by 39″ high partitions and three lavatories.

e. Shower room—11′10″ by 8′6″ (100 square feet). The shower room contains two showers and one bathtub.

f. Siderooms—There are six siderooms measuring 12′4″ by 7′3″ (89 square feet), and eleven siderooms measuring 11′9″ by 8′9″ (103 square feet).

g. There is no dormitory located on Biggs 6.

7. Biggs 7

a. Dayroom—37′10″ by 25′0″ (945 square feet).

b. Nurses Station—137 square feet.

c. Clothing room—12′0″ by 11′0″ (132 square feet).

d. Bathroom—12'6" by 12'0" (150 square feet). The bathroom contains three commodes separated by 39" high partitions and three lavatories.

e. Shower room—12'0" by 7'8" (92 square feet). The shower room contains two showers and one bathtub.

f. Siderooms—There are twelve siderooms measuring 12'0" by 7'3" (87 square feet), and eight siderooms measuring 12'0" by 8'9" (105 square feet).

g. There is no dormitory located on Ward 7.

h. Medication room—7'8" by 12'10" (98 square feet).

8. Biggs 8

a. Dayroom—38'0" by 25'0" (950 square feet).

b. Nurses Station—154 square feet.

c. Clothing room—12'0" by 11'0" (132 square feet).

d. Bathroom—12'6" by 12'0" (150 square feet). The bathroom contains three commodes separated by 42" high partitions, and three lavatories.

e. Shower room—12'0" by 7'8" (92 square feet). The shower room contains two showers and one bathtub.

f. Siderooms—There are nine siderooms measuring 12'0" by 7'3" (87 square feet), and three siderooms measuring 12'3" by 8'0" (98 square feet).

g. Dormitory—36'0" by 32'0" (1152 square feet). There are 11 cubicles in the dormitory on Biggs 8 containing 22 beds.

h. Medication Room—7'8" by 12'10" (98 square feet).

9. Biggs 9, Wing A

a. Dayroom—31'6" by 26'0" (819 square feet).

b. Nurses Station—240 square feet. This Nurses Station serves both Wings A & B of Ward 9.

c. Clothing room—12'0" by 10'10" (130 square feet).

d. Bathroom—12'0" by 8'6" (102 square feet). The bathroom contains five commodes separated by 42" high partitions, and four lavatories.

e. Shower room—12'0" by 10'8" (128 square feet). The shower room contains four showers and one commode.

f. Siderooms—12'0" by 7'3" (87 square feet). There are seven siderooms on Biggs 9.

g. Dormitory—44'2" by 31'2" (1378 square feet). There are 14 cubicles in the dormitory on Biggs 9A containing 16 beds.

10. Biggs 9, Wing B

a. Dayroom—31'6" by 26'0" (819 square feet).

b. Clothing room—12'0" by 10'10" (130 square feet).

c. Bathroom—12'0" by 8'6" (102 square feet). The bathroom contains five commodes separated by 42" high partitions, and four lavatories.

d. Shower room—12'0" by 10'8" (128 square feet). The shower room contains four showers and one commode.

e. Siderooms—12'0" by 7'3" (87 square feet). There are seven siderooms on Biggs 9B.

f. Dormitory—44'2" by 31'2' (1378 square feet). There are 14 cubicles in the dormitory on Ward 9B but the dormitory itself is not in use at the present time.

11. Biggs 11

a. Dayroom—31'0" by 28'3" (876 square feet).

b. Nurses Station—15'0" by 8'0" (120 square feet).

c. Clothing room—12'0" by 10'0" (120 square feet).

d. Bathroom—12'0" by 8'6" (102 square feet). The bathroom contains five commodes separated by 41" high partitions and four lavatories.

e. Shower room—12'0" by 8'0" (96 square feet). The shower room contains four showers.

f. Siderooms—12'0" by 7'3" (87 square feet). There are eight siderooms on Biggs 11.

g. Dormitory—44'0" by 31'0" (1364 square feet). There are 14 cubicles in the dormitory on Biggs 11 containing 28 beds.

h. There is a lavatory with three basins on Biggs 11.

12. Biggs 12

a. Dayroom—31'0" by 28'3" (876 square feet)

b. Nurses Station—15'0" by 8'0" (120 square feet).

c. Clothing room—12'0" by 10'0" (120 square feet).

d. Bathroom—12'0" by 8'6" (120 square feet). The bathroom contains five commodes separated by 41" high partitions and four lavatories.

e. Shower room—12'0" by 8'0" (96 square feet). The shower room contains four showers.

f. Siderooms—12'0" by 7'3" (87 square feet). There are eight siderooms on Biggs 12.

g. Dormitory—44'0" by 31'0" (1364 square feet). There are 14 cubicles in the dormitory on Biggs 12 containing 28 beds.

h. There is a lavatory with three basins on Biggs 12.

22. The Biggs Building includes several medical areas devoted to the physical well-being of patients which areas include:

1. A Dental Clinic.

2. An X-Ray Room.

3. An EEG Room.

4. An Eye Clinic.

23. Those areas of Biggs Building not specifically addressed in these stipulations include:

1. A Nurses Training Room.
2. Offices outside the main security gate for use of medical and administrative staff and for storage of medical records.
3. Offices within the security gates for social workers, psychologists and other therapists.
4. A staff conference room inside the security gate also used for patient staffings.
5. The Main Clothing Room inside the security gates.
6. A combination loading dock and security gate used for deliveries and access to outside activities.
7. A barbershop inside the security gates.

24. Each sideroom in the Biggs Unit contains an outside screened window. The window may be opened and closed.

25. The dormitories in the Biggs Unit contain outside screened windows. The windows may be opened and closed.

26. The dayrooms in the Biggs Building contain outside screened windows. The windows may be opened and closed.

27. The recreational facilities in the Biggs Unit include a large, fully-equipped gymnasium with a movie projector and large screen, an indoor olympic size swimming pool, a recreational area with two bowling alleys, three pool tables, card tables, an outdoor softball/baseball field, and two outside recreational areas.

28. There is a canteen located within the Biggs Unit for the use of the patients assigned there.

29. There are 67 monitors located within the control room at the Biggs Unit. The cameras in the Biggs Unit are allocated as follows:

1. The Wards have a total of 26 cameras monitoring the dayrooms and hallways only.
2. Hallways leading from one area in the Unit to another are monitored by a total of ten cameras.
3. The east stairwell has complete coverage with 10 cameras located on the four levels.
4. Cameras in the recreational area are located in the game room, gymnasium, and swimming pool.
5. The dining room is monitored by four cameras.
6. The psychology department is monitored by one camera.
7. The occupational therapy room is monitored by three cameras.
8. The canteen is monitored by one camera.
9. The visiting room is monitored by one camera.
10. The utility and recreation control rooms are monitored by two cameras each.
11. The outside recreational areas are monitored by one camera in each of the following locations: softball field, east activity area, west activity area, and the truck gate.

B. Staffing

30. The following is a list of the current full time and part-time professional staff whose primary assignment it is to work within the Biggs Unit at the Fulton State Hospital. The list includes the merit system title, the number of hours worked per week in the unit, professional degrees and certifications, and the years of experience of each professional staff member.

I. *Physicians*

1. Dr. Henry Bratkowski, D.O./Psychiatry, Full Time—40 hours/week.

   A. D.O., Kansas City College of Osteopathic Medicine, 1956-1960.

   B. Completed residency in Psychiatry at University of Missouri at St. Louis.

   C. Certified by American College of Psychiatry and Neurology, December 1974.

   D. 15 years of experience in mental health facilities.

2. Dr. Jerry Wessel, M.D./Psychiatry, Full Time—40 hours/week.

   A. M.D., St. Louis University, School of Medicine, 1964.

   B. Attended University of Missouri, Columbia/ Psychiatric Residency 1970-1973.

   C. Board Eligible.

   D. Eight years of experience in mental health facilities.

3. Dr. George Jones, D.O./General Practice Full Time—40 hours/week.

   A. D.O., Kansas City College of Osteopathic Medicine and Surgery—1933.

   B. Seven years experience in mental health facilities.

4. Dr. Boleslaw Lebkowski/Medical Extern, Full Time—40 hours/week.

   A. M.D., National University of Ireland, Galway, Ireland, 1956.

   B. Completed six years residence in Psychiatry in England, 1957-1963, in following hospitals:

      1. Bexley Hospital, Kent, England.

      2. Royal Eastern Counties Hospital, Colchester, England.

      3. Queens Park Hospital, Blackburn, England.

      4. St. James Hospital, Leeds, England.

      5. Stanley Royd Hospital, Wakefield, England.

   C. Is board eligible for member of Royal College of Physicians in Canada in Psychiatry.

   D. Twenty-one years experience in mental health facilities.

5. George Craft, M.D./Physician II in Psychiatry, Full Time—40 hours/week.

   A. A.B. in Chemistry with honors, University of Missouri, 1967.

      M.D., University of Missouri, 1971.

B. Member of:

1. American Medical Association.

2. NARI.

3. APPA.

C. Began employment last time at Fulton State Hospital November 6, 1978.

D. Board eligible. Psychiatric residency, University of Missouri Medical Center.

6. Dr. Joseph Lerner, M.D. Psychiatry, Part-time—32 hours/week.

A. M.D., Jefferson Medical School, Philadelphia, Pennsylvania, 1934.

B. Completed a six year residence at University of Michigan and Philadelphia State Hospital, 1936-1941.

C. Certified by Board of Psychiatry and Neurology by AMA in 1940 and 1941.

D. Thirty-five years experience in mental health facilities.

7. Dr. Sadashiv Parwatikar, M.D./Psychiatric Consultant, Part-time—8 hours/week.

A. M.D., Osmania University, India, 1961.

B. Completed three year residency (one year at Upstate Medical Center, Syracuse, New York, 1965-1966; two years at MIP, St. Louis, Missouri, 1966-1968).

C. Certified by Board of Psychiatry and Neurology, 1973.

D. Thirteen years of experience in mental health facilities.

8. Dr. Z. A. Ajans, M.D./Psychiatric Consultant, Part-time—24 hours/month (3 days/month at 8 hours/day).

   A. M.D., American University of Beirut, Lebanon, 1961.

   B. University of Missouri at Columbia (Psychiatry) 1969.

   C. Certified by Board of Psychiatry & Neurology in October, 1972.

   D. Member of:

      1. American Medical Association.

      2. American Psychiatric Association.

      3. President of Central Missouri Psychiatric Society.

      4. Member of Audrain County Medical Society.

      5. Member of American Geriatric Association.

   E. Began employment at Fulton State Hospital on August 10, 1978.

9. Humberto Parraga, M.D./Physician, Part-time—8 hours/week.

   A. M.D., University of San Francisco, December 1968.

   B. Cleveland Clinical Foundation, Cleveland, Ohio, July, 1978.

   C. Board Certified Medical Surgeon, February, 1969.

D. Member of:

1. Bolivian Medical Association.

2. American Medical Association.

3. American Psychiatric Association.

E. Began employment at Fulton State Hospital, September 26, 1978.

10. Bruce Harry, M.D./Physician General, Part-time—8 hours/week.

A. A.B., University of Missouri at Columbia, 1972.

B. M.D., University of Missouri Medical School, Columbia, 1977.

C. Member of:

1. American Medical Association.

2. Missouri State Medical Association.

3. Boone County Medical Association.

4. American Psychiatric Association.

5. Central Missouri Psychiatric Society.

D. Began employment at Fulton State Hospital, September 11, 1978.

II. *Psychology*

1. David Jannick, Clinical Psychologist III, Full Time—40 hours/week.

A. M.S. Clinical Psychology, Central Missouri State University, November 1973.

B. Six and one-half years experience in mental health facilities.

2. Michael Martin, Clinical Psychologist I, Full Time —40 hours/week.

   A. Ed.S. School Psychology, Kansas State University, Emporia, Kansas, 1969.

   B. Nine years experience in mental health facilities.

3. Don Belsky, Clinical Psychologist I, Full Time— 40 hours/week.

   A. M.S. Clinical Psychology, Central Missouri State University, 1976.

   B. Two years experience in mental health facilities.

4. David Kanive, Clinical Psychologist I, Full Time —40 hours/week.

   A. B.A. Psychology, University of Nebraska, 1976. M.S. Clinical Psychology Central Missouri State University, 1978.

   B. Six months experience in mental health facilities.

5. Rick Sommers, Psychological Technician, Full Time—40 hours/week.

   A. B.S. Psychology, Lincoln University, 1977.

   B. One year experience in mental health facilities.

6. Gary Justice, Psychology Consultant, Part-time— 4 hours/week.

   A. B.A. History and Psychology Central Methodist College, 1962. Masters in Divinity Pastoral

Ministry, Yale University, 1965. Masters in Education Counseling Psychology, University of Missouri, Columbia, 1968.

Ed.S., 30 credit hours beyond Masters in Education, University of Missouri, Columbia, 1970.

Ph.D. Education with concentrations in organizational psychology and higher education, St. Louis University, 1977.

B. Nine years experience in mental health facilities.

7. Algiman Shimkunas, Ph.D., Clinical Psychologist, Part-time—16 hours/week.

A. B.S., St. Louis University, 1962.

M.S., St. Louis University, 1964.

Ph.D., Clinical Psychology, St. Louis University, 1967.

Post Doctoral Fellow, University of Connecticut, 1967-1968.

B. Member of:

1. American Psychological Association.
2. American Association for Advancement of Science.
3. Missouri Psychological Association.
4. Licensed Psychologist, State of Missouri.
5. National Register for Health Service Providers in Psychology.

C. Eight months experience in mental health facilities.

8. Dawn Van Beek, Communications Specialist, Part-time—24 hours/week.

   A. B.S. Speech and Drama University of Oklahoma, 1966.

      M.A. Communications University of Oklahoma, 1970.

      Forty-five hours toward Ph.D. at University of Missouri in Communications and Social Psychology.

   B. Member of:

      1. International Communications Association.
      2. Speech Association of America.

   C. Two and one-half months experience in mental health facilities.

III. *Social Services*

1. Joan Berry, Psychiatric Social Work Supervisor I, Full Time—40 hours/week.

   A. B.A. Psychology, University of Missouri, Columbia, 1970.

      MSW, University of Missouri, Columbia, 1974.

   B. Member of:

      1. National Association of Social Workers.
      2. Academy of Certified Social Workers.
      3. American Association of Sex Educations, Counsellors and Therapists.

   C. Nine years experience working in mental health facilities.

2. David Mitchell, Psychiatric Social Worker I, Full Time—40 hours/week.

   A. B.A., Westminster College, 1973.

      MSW, University of Iowa, June 1977.

   B. Six and one-half months experience in mental health facilities.

3. Kathi Smith, Psychiatric Social Worker I, Full-Time—40/hours week.

   A. M.S., Counseling Psychology, University of Alaska, 1974.

      B.A., German, University of Kentucky, 1968, magna cum laude.

   B. Member of:

      1. Phi Beta Kappa.

   C. Began employment at Fulton State Hospital, December 11, 1978.

4. Linda Milton, Clinical Casework Assistant I, Full Time—40 hours/week.

   A. B.A., Psychology, University of Missouri at Columbia, May, 1978.

   B. Eight months experience working in mental health facilities.

5. Jack Rogers, Clinical Casework Assistant I, Full Time—40 hours/week.

   A. B.S. Secondary Education, Southeast Missouri State University, 1966.

      21 hours graduate work in counseling, Southeast Missouri State University, 1978-79.

B. Member of:

1. Missouri Juvenile Justice Association.

C. Began employment at Fulton State Hospital, December 18, 1978.

6. Rodney Kitchen, Clinical Casework Assistant II. Currently on work study leave since August 22, 1977 to University of Missouri, Columbia, for MSW. Will graduate in May, 1979, and return to Biggs Unit in June, 1979.

A. B.A., Social Work, University of Missouri, Columbia, 1973.

B. Three years and ten months experience working in mental health facilities.

IV. *Education*

1. Conrad Creach, Teacher V, Full Time—40 hours/week.

A. Ten years experience teaching MI or MR persons.

B. B.S. Secondary Education, Lincoln University, 1962.

C. Licensed to teach by the State of Missouri.

2. William Stone, Teacher V, Full Time—40 hours/week.

A. Three years and eight months experience teaching MI or MR persons.

B. B.S. Secondary Education, Southeast Missouri State University, 1961.

C. Licensed to teach by the State of Missouri.

3. Mary Morris, Special Education Teacher I, Full time—40 hours/week.

   A. Eight months experience teaching MI or MR persons.

   B. B.S. in Education, Lincoln University, 1976.

   C. Licensed to teach by the State of Missouri.

   D. Certified in Elementary (K-8), Learning Disabilities (K-12), and Educable Mentally Retarded (K-12).

4. Harley Henry, Teacher III, Part-time—20 hours/week .

   A. Twenty years experience teaching MI or MR persons.

   B. High school diploma.

   C. Not licensed by State of Missouri.

   D. Not certified in Special Education.

V. *Vocational Education*

1. Nollie Guerrant, Vocational Education Instructor II, Full Time—40 hours/week.

   A. Three years experience teaching MI or MR persons.

   B. Associate of Technology Degree (Auto Mechanics), Linn Technical College, 1974.

   B.S. Chemistry, Pennsylvania State University, 1955. Additional college courses totaling 14 credit hours from Missouri and Lincoln Universities and William Woods College between 1976 and 1977.

C. Licensed to teach by the State of Missouri.

D. Not certified in Special Education.

2. Julius Schrader, Vocational Education Supervisor, Part-time—36 hours/week.

A. B.S., Industrial Education, University of Tennessee, 1968;

M.S., Industrial Education, University of Missouri, 1969;

E.D.S., Industrial Education, University of Missouri, 1970.

B. Seven and one-half years experience in Mental Health facilities.

VI. *Registered Nurses*

1. Iris Owens, R.N., Graduate Nurse VI, Full Time—40 hours/week.

A. Graduate City Hospital School of Nursing, Aberdeen, Scotland, 1951 and graduated Stracatiro General Hospital School of Nursing, Angus, Scotland, 1953.

State Boarded in Missouri for Obstetrics, City Hospital, St. Louis, Missouri, 1963.

State Boarded in Missouri for Psychiatric Nursing, Malcolm Bliss, 1963.

B. Fifteen years experience working in mental health facilities.

2. Mari Fregni, R.N., Graduate Nurse IV, Full Time —40 hours/week.

A. Graduated San Jose, California City College School of Nursing, 1964.

B. Thirteen years experience working in mental health facilities.

3. Gary Winter, R.N., Graduate Nurse IV, Full Time —40 hours/week.

A. Associate Degree (Nursing), Lincoln University, May 1978.

B. Member of:

1. American Nurses Association.

C. Seven and one-half years experience working in mental health facilities.

4. Belinda Heimericks, R.N., Graduate Nurse IV, Part-time—24 hours/week.

A. B.S. Degree in Nursing, Central Missouri State University, May, 1973.

B. Member of:

1. American Nurses Association.

C. Six years experience working in mental health facilities.

VII. *Licensed Practical Nurses*

1. Ronnie O'Neal, L.P.N., Psychiatric Aide III, Full Time—40 hours/week.

A. Graduated from Jefferson City Public School of Nursing, 1973.

B. Ten years, four months experience working in mental health facilities.

VIII. *Chaplaincy*

1. Robert Vegiard, Clinical Pastoral Counselor I, Full Time—40 hours/week.

   A. B.A. (English), University of Kansas City, May 1959.

      Master of Divinity, Midwestern Baptist Theological Seminary, May 1963.

      Clinical Pastoral Education, Basic Unit (1), Columbus State Hospital, Columbus, Ohio.

      Advanced Units, Fulton State Hospital, Fulton, Missouri.

      Ordained Minister of Christian Church (Disciples of Christ).

      Chaplain's Endorsement (1976), Chaplain's Commission of Christian Church (Disciples of Christ).

      Chaplaincy approval by Interfaith Chaplain's Commission of Missouri Council of Churches (1975).

      Member of Association of Mental Health Clergy.

   B. Four years experience working in mental health facilities.

2. Richard Rummel, Clinical Pastoral Counselor I, Part-time, 15 hours/week.

   A. B.A., University of Washington, 1951;
      M.Ph. St. Alberts College, 1954.

   B. Eleven years experience in mental health facilities.

   C. Ordained minister, United Church of Christ.

IX. *Vocational Rehabilitation*

1. Charles E. Holmes, Industrial Therapist I, Full Time—40 hours/week.

   A. High school diploma.

   B. Nineteen years, six months experience working in mental health facilities.

X. *Recreational Therapy*

1. Harlond Conn, Activity Therapist, Full Time—40 hours/week.

   A. High school diploma.

   B. Twenty years experience in mental health facilities.

2. Samuel Langley, Activity Aide II, Full Time—40 hours/week.

   A. High school diploma.

   B. Twenty-two years experience in mental health facilities.

3. Maurice Rankin, Activity Aide II, Full Time—40 hours/week.

   A. High school diploma plus 2 years college, Westminster College, Fulton, Missouri.

   B. Ten years, three months experience in mental health facilities.

4. Louis Williamson, Activity Aide II, Full Time—40 hours/week.

   A. High school diploma.

B. Ten years, one month experience in mental health facilities.

5. Danny O'Neal, Activity Aide II, Full Time—40 hours/week.

A. B.A., Physical Education, Westminster College, Fulton, Missouri, May 1977.

B. Three and one-half years experience in mental health facilities.

C. Professional Registration: Missouri State Teachers Certificate.

XI. *Occupational Therapy*

1. William Collister, Activity Aide II, Full Time—40 hours/week.

A. Professional Degree in Art, 1955, Kansas City Art Institute.

B. Twenty-two years of experience in field of occupational therapy.

2. Edna Diehl, Activity Aide III, Full Time—40 hours/week.

A. High school diploma.

B. Seventeen years service in field of occupational therapy.

3. Nina May Smith, Activity Aide II, Full Time—40 hours/week.

A. High school diploma.

B. Three months experience in mental health facilities.

4. Dorothy R. Smith, Activity Aide III, Full Time--40 hours/week.

   A. High school diploma.

   B. Professional Registration: Certified Occupational Therapist Assistant.

   C. Fifteen years of experience in the field of occupational therapy.

XII. *Music Therapy*

1. Ray Nilges, Music Therapist I, Full Time—40 hours/week.

   A. Bachelor of Music Degree, Lincoln University, 1964. Lifetime Missouri Teaching Certificate Issued.

   B. Two years choir directing from 1964 to 1966, Immaculate Conception Church, Jefferson City, Missouri.

   Five years high school band directing from 1964-1969 at Helias High School, Jefferson City, Missouri.

   Four years high school drum and bugle corps directing at Helias High School from 1964-1968.

   Two years of high school boys' choir directing from 1964 to 1966 at Helias High School, Jefferson City, Missouri.

   Five years grade school band directing from 1964-1969 at St. Joseph's School, Jefferson City, Immaculate Conception School, Jefferson City, and St. Peter's School, Jefferson City .

C. Seven years experience working in mental health facilities.

2. Scott Walker, Music Therapist I, Part-time—20 hours/week.

A. B.A., Westminster College, Fulton, Missouri, 1970 with Lifetime Teaching Certificate in Music for State of Missouri.

B. Three years experience in public school systems in State of Missouri.

C. Member of:

1. Missouri State Teachers Association.

2. National Jazz Educators Association.

3. Executive Board of American Federation of Musicians Local #217.

D. Four years experience working in mental health facilities.

XIII. *Unit Director of Administration*

1. Joseph Mangini, Unit Director, Mental Health, Full Time—40 hours/week.

A. A.A. in Agriculture, University of New Hampshire, May 1961.

B.A. in Psychology, University of Missouri, Columbia, June, 1967.

MSW, University of Missouri, Columbia, June, 1970.

B. Nine years, ten months experience working in mental health facilities.

31. The following is a list of the Psychiatric Aide IIIs in the Biggs Unit:

1. Glen Anderson, Psychiatric Aide III, Full Time—40 hours/week.
   A. Twenty-two years and three months experience in mental health facilities.

2. Clark Gilman, Psychiatric Aide III, Full Time—40 hours/week.
   A. Twenty-five years and five months experience in mental health facilities.

3. Bob Smith, Psychiatric Aide III (Unit Chief of Security), Full Time—40 hours/week.
   A. Twenty-two years and eight months experience in mental health facilities.

4. Elliott Farley, Psychiatric Aide III, Full Time—40 hours/week.
   A. Sixteen years and ten months experience in mental health facilities.

5. Clifford Barnes, Psychiatric Aide III, Full Time—40 hours/week.
   A. Twelve years and two months experience in health facilities.

6. Don Branch, Psychiatric Aide III, Full Time—40 hours/week.
   A. Twenty-eight years and five months experience in mental health facilities.

32. The following is a list of the funded full time non-professional staff assigned to the Biggs Building:

Title	*Number of Employees*
Hospital Attendant I	11
Psychiatric Aide I	93*
Psychiatric Aide II	48*
Dietary:	
Cook I	2
Cook II	3
Cook III	1
Cooks Helpers	4
Housekeeping:	
Custodial Worker I	5
Custodial Worker Supervisor	1
Secretaries:	
Clerk II	1
Clerk Typist II	5
Clerk Steno II	1
Clerk Steno III	1
Clothing Room:	
Storeclerks	2

* At the present time there are nine vacancies in the Psychiatric Aide I category and one vacancy in the Psychiatric Aide II category.

33. One Barber II works part-time in the Biggs Unit for a total of twenty-four hours per week.

34. The following is a list of consultants who provide specified services to the Biggs Unit at the Fulton State Hospital. These individuals are not employees of the Hospital, but rather provide services on a contractual basis. The list contains the name of the consultant, his or her speciality, and the number of hours per week devoted to the Biggs Unit:

Consultant	*Speciality*	*Number of Hours Worked in Biggs Per Week*
James R. Criscione, M.D.	Surgeon	2
Patricia Baxter, R.N.	Scrub Nurse	2
Thomas Brant	Podiatrist	1
C. M. Blackwell, M.D.	Radiologist	3
C. M. Waggoner, M.D.	Radiologist	3
Willard Coplin, C.R.N.A.	Anesthesiologist	2
C. M. Picard, M.D.	Internal Medicine	3
Blair Carmichael	Lab Assistant	2
Araminta Smith	Social Work Consultant	4

35. Dr. Jerry E. Foote, M.D., Dermatologist, visits the Forensic Unit of the Fulton State Hospital twice per month for forty-five minutes each visit.

36. Dr. Herbert Rosenbaum, M.D., Neurologist, visits the Forensic Unit every two weeks for one and a half hours per visit.

37. Richard White, Optometrist, provides services to the Biggs Unit for one hour per month.

38. The following list contains the names, specialities and hours per week spent in the Biggs Unit by Mainside hospital staff:

Name	*Speciality*	*Number of Hours Worked in Biggs Per Week*
Arthur Lee, Jr., D.M.D.	Dentist	4
Kevin Whit[illegible], D.D.S.	Dentist	14
Shirley Ols[illegible]	Occupational Therapist	.4
Gail Cunningham	Occupational Therapist	2.8
Ruth Ann Menneke	Supervisor, Volunteer Services	3
Sharon Pflantz	Dietician	8

39. The Maintenance Department at the Fulton State Hospital devotes 860 (5 full time equivalents) manhours per month to routine maintenance in the Biggs Unit. This figure does not include manhours spent on work in the utility tunnels on electric, steam, water service to all buildings, nor does it include manhours spent on major repair or renovation projects in the unit. Between January 1978 and February, 1979, the Maintenance Department devoted approximately 6,700 manhours to the repainting of ten wards in the Unit.

40. The Laundry Department devotes 507 manhours per week to the Forensic Unit. The work includes cleaning of clothing, linens and housekeeping supplies.

C. Treatment Programs

41. *Program I* in the Biggs Unit includes patients diagnosed as chronic schizophrenics. Program I patients reside on Wards 1 and 2 (62 patients as of March 30, 1979) in the Biggs Unit. The following is a list of the staff members who make up the treatment team for Program I along with a statement of the number of hours per week spent by each staff member working with the treatment team for Program I:

Name	*Number of Hours Worked per Week*
Dr. Jerry Wessell, M.D.	Full Time
Michael Martin, Psychology (Program Coordinator)	Full Time
David Mitchell, Social Service	Full Time
Ray Nilges, Music Therapy	Part-Time (10 hrs/week)
Dorothy Smith, Occupational Therapy	Part-Time (16 hrs/week)
Maurice Rankin, Recreational Therapy	Part-Time (10 hrs/week)
William Stone, Education	Part-Time (1 hr/week)
Nollie Guerrant, Vocational Education	Part-Time (½ hr/week)
Robert Vergiard, Chaplain	Part-Time (5 hrs/week)
Charles Holmes, I. T. Consultant	Part-Time (4 hrs/week)

42. *Program II* in the Biggs Unit includes patients diagnosed as sex offenders, personality disorders, and pretransfers. Program II patients reside on Wards 11 and 12 (47 patients as of March 30, 1979) in the Biggs Unit. The following is a list of the staff members who make up the treatment team for Program II along with a statement of the number of hours per week spent by each staff member working with the treatment team for Program II:

Name	*Number of Hours Worked per Week*
Dr. Joseph Lerner, M.D.	Part-Time (20 hrs/week)
David Jannick, Psychology (Program Coordinator)	Full Time
Al Shimkunas, Psychology	Part-Time (12 hrs/week)
Joan Berry, Social Service	Part-Time (30 hrs/week)
Scott Walker, Music Therapy	Part-Time (4 hrs/week)
Nina Smith, Occupational Therapy	Part-Time (14 hrs/week)
Louis Williamson, Recreational Therapy	Part-Time (10 hrs/week)
William Stone, Education	Part-Time (4 hrs/week)
Nollie Guerrant, Vocational Education	Part-Time (1 hr/week)
Robert Vegiard, Chaplain	Part-Time (20 hrs/week)
Charles Holmes, I.T. Consultant	Part-Time (4 hrs/week)

43. *Program III* in the Biggs Unit includes patients diagnosed as mentally retarded and/or brained damaged patients. Program III patients reside on Wards 5 and 6 (26 patients as of March 30, 1979) in the Biggs Unit. The following is a list of the staff members who make up the treatment team for Program III along with a statement of the number of hours per week spent by each staff member working with the treatment team for Program III:

Name	*Number of Hours Worked per Week*
Dr. Henry Bratkowski, D.O.	Part-Time (20 hrs/week)
Mary Morris, Special Education Teacher (Program Coordinator)	Full Time

Al Shimkunas, Psychology	Part-Time (2 hrs/week)
Linda Milton, Social Service	Full Time
Ray Nilges, Music Therapy	Part-Time (2 hrs/week)
Edna Diehl, Occupational Therapy	Part-Time (13 hrs/week)
Harlond Conn, Recreational Therapy	Part-Time (10 hrs/week)
Sam Langley, Recreational Therapy	Part-Time (10 hrs/week)
Conrad Creach, Education	Part-Time (4 hrs/week)
Nollie Guerrant, Vocational Education	Part-Time (¾ hr/week)
Robert Vegiard, Chaplain	Part-Time (5 hrs/week)
Charles Holmes, I.T. Consultant	Part-Time (28 hrs/week)

44. *Program IV* in the Biggs Unit includes patients diagnosed as acute patients, maximum security patients and new admissions. Program IV patients reside on Wards 3, 7 and 8 (72 patients as of March 30, 1979) in the Biggs Unit. The following is a list of the staff members who make up the treatment team for Program IV along with a statement of the number of hours per week spent by each staff member working with the treatment team for Program IV:

Name	*Number of Hours Worked per Week*
Dr. George Craft, M.D.	Full Time
David Kanive, Psychology (Program Coordinator)	Full Time
Kathi Smith, Social Service	Full Time
Joan Berry, Social Service	Part-Time (10 hrs/week)
Jack Rogers, Social Service	Part-Time (16 hrs/week)
Ray Nilges, Music Therapy	Part-Time (4 hrs/week)

William Collister, Occupational Therapy	Part-Time (8 hrs/week)
Dan O'Neal, Recreational Therapy	Part-Time (10 hrs/week)
Harley Henry, Education	Part-Time (4 hrs/week)
Nollie Geurrant, Vocational Education	Part-Time (4 hrs/week)
Robert Vegiard, Chaplain	Part-Time (5 hrs/week)
Richard Rummel, Chaplain	Part-Time (15 hrs/week)
Charles Holmes, I.T. Consultant	Part-Time (4 hrs/week)

45. *Program V* in the Biggs Unit handles pretrial evaluations. Ward 9 is the only ward assigned to Program V. As of March 30, 1979, Ward 9 had 22 patients. The following is a list of the staff members who make up the treatment team for Program V along with a statement of the number of hours per week spent by each staff member working with the treatment team for Program V:

Name	*Number of Hours Worked per Week*
Dr. Henry Bratkowski, D.O.	Part-Time (20 hrs/week)
Dr. Sadashiv Parwatikar, M.D.	Part-Time (8 hrs/week)
Dr. Humberto Parraga, M.D.	Part-Time (8 hrs/week)
Dr. Bruce Harry, M.D.	Part-Time (8 hrs/week)
Dr. Joseph Lerner, M.D.	Part-Time (20 hrs/week)
Donald Belsky, Psychology (Program Coordinator)	Full Time
Rick Sommers, Psychological Technician	Part-Time (32 hrs/week)
Gary Justice, Psychology	Part-Time (4 hrs/week)
Jack Rogers, Social Service	Part-Time (24 hrs/week)

46. The following is a chart* describing the assignment of funded Psychiatric Aide I and II positions in the Biggs Unit at the Fulton State Hospital per shift:

Location	*7-3 Shift*	*3-11 Shift*	*11-7 Shift*
Biggs 1	5	4	3
Biggs 2	5	6	3
Biggs 3	5	5	4
Biggs 5	4	4	3
Biggs 6	4	4	2
Biggs 7	7	7	6
Biggs 8	7	7	5
Biggs 9	8	7	6
Biggs 11	3	1	1
Biggs 12**	2	2	1
Control Room	5	4	4
Control Room Rear Gate	1		
Nursing Administration	4		
Includes:			
PA II (Security)			
PA I (Security)			
PA I (Driver)			
PA I (Classroom Monitor)			
PA II (Assistants to PA III)	3		

* These figures do not necessarily mean that there are actually this many aides on the wards at any one time. These figures reflect the distribution of funded Psychiatric Aide I and II positions by Ward. Daily adjustments are made for such things as annual leave, sick leave, and a seven day work week.

** These aides are presently located on Biggs 4 while the patients from Biggs 12 reside there during the painting of their permanent ward.

47. The Vocational Education Program is conducted in an area approximately 32′ by 70′ in size (2240 square feet.) Three job skill areas are currently offered in the Vocational Education area. These include auto mechanics, metal trades and small engine repair. As of March 27, 1979, there were thirteen patients enrolled in the vocational program.

48. The Academic Education Program is conducted in four classrooms, one study room and three offices. Courses are taught in both general and special education. As of March 29, 1979 there were 18 patients enrolled in general education courses and twenty-seven patients enrolled in special education.

49. The Recreational Therapy Program in the Biggs Unit consists of a gymnasium/auditorium offering standard gym equipment for basketball, volleyball, small games and exercise activities. There is also a game room area containing three pool tables, a ping-pong table, a two lane bowling alley, and a small movie area. An indoor olympic size swimming pool is also contained in the recreation department. The recreation department also contains two outdoor exercise yards. As of April 11, 1979, there were 83 patients formally enrolled as referred by their treatment teams in the recreational therapy program in the Biggs Unit. This figure does not include leisure time use of the recreational facilities.

50. The Music Therapy Department in the Biggs Unit consists of one office, two listening rooms and one room suitable to accommodate up to twelve patients. A record library is maintained in the office. The instruments available for patients usage and for lessons include trombone, clarinet, trumpet, saxophone, guitar, piano, percussion instruments. The music therapy program also conducts group sings, individual instrumental and vocal lessons, theory lessons, individual listening and group listening programs. As of April 11, 1979, there were 37 patients enrolled in the music therapy program in the Biggs Unit.

51. The Occupatienal Therapy Program in the Biggs Unit is conducted in a room approximately 28'0" by 60'0" (1680 square feet). The occupational therapy shop is

equipped with work tables, chairs, cabinets for tools and supplies, woodworking equipment, three floor looms, and a ceramic kiln. Major crafts offered in the occupational therapy program include leather work, woodworking, weaving, art and ceramics. As of April 11, 1979, there were 91 patients enrolled in the occupational therapy program in the Biggs Unit.

52. As of April 10, 1979 there were 48 patients enrolled in the Industrial Therapy program in the Biggs Unit. These patients perform various types of compensated labor at the Fulton State Hospital.

53. As of April 10, 1979 there were 73 patients enrolled in group therapy and an additional 51 patients enrolled in individual therapy.

D. Patient Information

54. As of March 30, 1979, there were 229 patients residing in the Biggs Unit at the Fulton State Hospital.

55. As of March 30, 1979, the racial breakdown of patients residing in the Biggs Unit was as follows:

1. Black—85.
2. White—143.
3. Other—1.

56. As of March 30, 1979, the age breakdown of the patients residing in the Biggs Unit was as follows:

Age Group	*Number*
17 years	1
18–21	26
22–25	48
26–35	82
36–45	36
46–55	24
Over 55	12

57. The following list describes the type of commitment for each patient residing in the Biggs Unit as of March 30, 1979:

Type of Commitment	*Number of Patients*
Probate Court	39
Voluntary	4
Standard Non-Judicial	1
Juvenile Court	3
Pretrial Evaluation (C-1) (Section 552.020)	34
Not Competent to Stand Trial (C-2) (Section 552.020)	21
Not Guilty by Reason of Mental Disease or Defect (C-3) (Section 552.040)	100
Criminal Sexual Psychopath (C-4) (Section 202.730)	19
Transfers from the Missouri Department of Corrections (C-5) (Section 552.050)	6
Other (C-6)	2

58. The following is a list of the patient population on each Ward in the Biggs Unit as of March 30, 1979:

Ward	*Number of Patients*
B-1	32
B-2	30
B-3	32
B-4*	26
B-5	11
B-6	15
B-7	14
B-8	26
B-9	22
B-11	21

* Patients from Biggs 12 temporarily reside in Biggs 4.

III.

Rehabilitation Unit

A. Physical Environment

59. The following is a list of the pertinent measurements on the wards in the Rehabilitation Unit at the Fulton State Hospital:

1. Ward 2 South
   a. Dayrooms—There are two dayroom areas measuring 23'0" by 20'0" and 41'0" by 28'0" for a total of 1608 square feet of dayroom space.
   b. Visiting room—15'0" by 8'0" (120 square feet).
   c. Nurses Station—170 square feet.
   d. Dormitory—58'0" by 36'0" (2088 square feet). The domitory on Ward 2 South has 9 cubicles containing 27 beds.
   e. Bathroom—18'0" by 12'0" (216 square feet). The bathroom on Ward 2 South contains four commodes which are completely enclosed, and three lavatories.
   f. Shower Area/Bathroom—20'0" by 14'0" (280 square feet). The shower area/bathroom contains two completely enclosed commodes, two lavatories, one bathtub and two showers.
2. Ward 3 South
   a. Dayroom—41'0" by 28'0" (1148 square feet).
   b. Visiting room—15'0" by 8'0" (120 square feet).
   c. Nurses Station—170 square feet.
   d. There are two quiet rooms located on Ward 3 South. One measures 12'0" by 8'0" (96 square feet), and the other one measures 13'0" by 8'6" (110 square feet).

e. Dormitory—58'0" by 36'0" (2088 square feet). The dormitory on Ward 3 South has 9 cubicles containing 26 beds.

f. Rooms—There are three rooms on Ward 3 South. One room measures 15'0" by 8'0" (120 square feet). One room measures 12'0" by 10'10" (120 square feet), and the third room measures 15'0" by 9'0" (135 square feet).

g. Bathroom—18'0" by 12'0" (216 square feet). The bathroom on Ward 3 South contains four completely enclosed commodes and three lavatories.

h. Shower area/Bathroom—20'0" by 14'0" (280 square feet). The shower area/bathroom on Ward 3 South contains one enclosed commode, three lavatories, one bathtub and two showers.

3. Ward 6 South

a. Dayroom/Hallway—1920 square feet.

b. Visiting room—13'0" by 8'6" (110 square feet).

c. Rooms—There are fifteen rooms located on Ward 6 South. The sizes of these rooms and their capacities are as follows:

(1) Ten single bed rooms ranging from a minimum of 71 square feet to a maximum of 104 square feet.

(2) Three three-bed rooms ranging from a minimum of 163 square feet to a maximum of 221 square feet.

(3) Two four-bed rooms, one measuring 210 square feet and the other measuring 234 square feet.

d. Clothing room—12'0" by 11'0" (132 square feet).

e. Bathrooms—There are two bathrooms located on Ward 6 South. One bathroom measures 6'0" by 5'0" (30 square feet) and contains one commode and one lavatory. The other bathroom measures 15'0" by 12'6" (186 square feet) and contains four completely enclosed commodes and four lavatories.

f. Shower area—15'0" by 12'6" (186 square feet). The shower area contains four lavatories and two showers.

g. Nurses Station--20'6" by 11'4" (232 square feet) this nurses station serves both Wards 6 South and 10 South.

h. Medicine Room—10'0" by 7'0" (70 square feet). This medicine room serves both Wards 6 South and 10 South.

4. Ward 10 South

a. Dayroom/Hallway—2018 square feet.

b. Visiting room—12'0" by 11'0" (132 square feet).

c. Clothing room 17'0" by 12'0" (204 square feet).

d. Rooms—There are fifteen rooms on Ward 10 South. The sizes of these rooms and their capacities are as follows:

(1) Nine single bed rooms ranging from a minimum of 63 square feet to a maximum of 108 square feet.

(2) Four two bed rooms ranging from a minimum of 99 square feet to a maximum of 180 square feet.

(3) One three bed room measuring 180 square feet.

(4) One four bed room measuring 471 square square feet.

e. Bathroom—14'0" by 12'0" (168 square feet). The bathroom contains four completely enclosed commodes and one lavatory.

f. Shower area/Bathroom—17'0" by 11'0" (187 square feet). The shower area/bathroom contains one completely enclosed commode, two lavatories, two showers and one bathtub.

60. The parties have agreed that the physical facilities in the Rehabilitation Unit are adequate.

61. The patients in the Rehabilitation Unit have access to the mainside canteen and dining halls.

B. Staffing

62. The following is a list of the full time and part-time professional staff in the Rehabilitation Unit at the Fulton State Hospital. The listing includes the merit system title, the number of hours worked per week in the unit, professional degrees and certifications, and the years of experience of each professional staff member.

I. *Physicians*

1. Edward Tellez, M.D./Chest Specialist, Full Time—40 hours/week.

A. M.D., University of Havana, Havana, Cuba, 1946.

B. Twenty-two years experience in mental health facilities. Dr. Tellez has reported to seven different board certified Psychiatrists as his superiors while employed at Fulton State Hospital from 1962 to present.

C. Neither board certified nor board eligible in psychiatry.

II. *Psychology*

1. Walter DeClue, Clinical Psychologist IV, Full Time—40 hours/week.
   A. A.B. Psychology, Washington University, 1948.
      M.A. Psychology, University of Colorado, 1950.
   B. Five years experience in mental health facilities. Superintendent at Boonville Training School, 1960-1973.
2. Richard Strecker, Psychological Technician, Full Time—40 hours/week.
   A. B.A. Psychology and Speech, Westminster College, 1974.
   B. Four years experience in mental health facilities.

III. *Social Services*

1. Laura A. Morrow, Psychiatric Social Worker II, Full Time—40 hours/week.
   A. MSW, University of Missouri, Columbia, 1975.
      A.B., (Sociology), University of Missouri, Columbia, 1971.
   B. Member of:
      1. Academy of Certified Social Workers.
      2. National Association of Social Workers.
   C. Nine years, nine months experience in mental health facilities.
2. Susan E. Eidson, Clinical Casework Assistant I, Full Time—40 hours/week.
   A. B.A., Sociology, Lincoln University, 1977.
   B. One year, six months experience in mental health facilities.

IV. *Registered Nurses*

1. Mary Dungan, R.N., Graduate Nurse III, Full Time—40 hours/week.

   A. A.D. in Nursing, Lincoln University, 1975.

   B. Twenty years experience working in mental health facilities.

V. *Licensed Practical Nurses*

1. Jerry Terrell, L.P.N., Psychiatric Aide III, Full Time—40 hours/week.

   A. Licensed Practical Nurse, Columbia School of Practical Nursing, 1978.

   B. Member of:

      1. Missouri Association of Licensed Practical Nursing.

   C. Twenty years experience in mental health facilities.

VI. *Vocational Rehabilitation*

1. Paula F. Nickelson, Counselor, Division of Vocational Rehabilitation, Department of Education, Full Time—40 hours/week.

   A. B.S. Psychology with emphasis in rehabilitation, Central Missouri State College, Warrensburg, 1977. M.Ed. in Counseling, University of Missouri, Columbia, 1978.

   B. Member of:

      1. National Rehabilitation Association.

2. National Rehabilitation Counselor's Association.

2. Sara G. Hume, Industrial Therapist II, Full Time—40 hours/week.

A. High school diploma.

B. Twenty-eight years experience in mental health facilities.

VII. *Recreational Therapy*

1. Benjamin C. Hawkins, Activity Aide III, Full Time—40 hours/week.

A. High school diploma.

B. Eighteen years experience in mental health facilities.

2. Treva Fletcher, Activity Aide II, Full Time—40 hours/week.

A. High school diploma.

B. Fourteen years experience in mental health facilities.

VIII. *Occupational Therapy*

1. Pauline Patrick, Activity Aide III, Full Time—40 hours/week.

A. High school diploma.

B. Twenty and one-half years experience in mental health facilities.

IX. *Music Therapy*

1. Scott Walker, Music Therapist I, Part-Time—20 hours/week.

63. The following is a list of the Psychiatric Aide IIIs in the Rehabilitation Unit:

1. Bob Scott, Psychiatric Aide III, Full Time—40 hours/week.

   A. Fifteen years and 3 months experience in mental health facilities.

64. The following is a list of the funded full time non-professional staff assigned to the Rehabilitation Unit:

Merit System Title	*Number of Employees*
Psychiatric Aide I	22
Psychiatric Aide II*	12
Housekeeping:	
Custodial Worker I	2
Custodial Worker II	1
Secretaries:	
Clerk Steno II	1

* At the present time there is one vacancy in the Psychiatric Aide II category.

65. The following is a list of consultants who provide specified services to the Rehabilitation Unit at the Fulton State Hospital. These individuals are not employees of the Hospital, but rather provide services on a contractual basis. The list contains the name of the consultant, his or her speciality, and the number of hours per week devoted to the Rehabilitation Unit:

Consultant	*Speciality*	*Number of Hours Worked in Rehabilitation Unit Per Week*
James R. Criscione, M.D.	Surgeon	3
Patricia Baxter, R.N.	Scrub Nurse	3
Thomas Brant	Podiatrist	3
Stanley Davies	Podiatrist	3
C. M. Blackwell, M.D.	Radiologist	6
C. M. Waggoner, M.D.	Radiologist	6
Katherine Brown, M.D.	Anesthesiologist	1
Willard Coplin, C.R.N.A.	Anesthesiologist	3
C. M. Picard, M.D.	Internal Medicine	4

66. The following list contains the names, specialities and hours per week devoted to the Rehabilitation Unit by Mainside hospital staff who provide direct treatment:

Name	*Speciality*	*Number of Hours Providing Services in Which Rehabilitation Unit Patients Participate Per Week*
Arthur Lee, Jr., D.M.D.	Dentist	16
Kevan Whitsitt, D.D.S.	Dentist	3
Willie C. Piggee	Special Education Teacher	35*
Jane S. Rook	Special Education Teacher	6*
Don Kennison	Vocational Education Teacher	30*
Sam Sheldon	Vocational Education Teacher	40*
Julius Schrader	Vocational Education Supervisor	4*
Shirley Olson	Occupational Therapist	4*
Gail Cunningham	Occupational Therapist	6*
Ruth Ann Menneke	Supervisor, Volunteer Services	1
Bob Meyer	Recreational Therapy	12*
Jerry Holmes	Recreational Therapy	12.8*
Harley Henry	Teacher III	20*
Helen Kaufmann	Occupational Therapy	20*
Walter Wolking	Occupational Therapy	24*
Frank Schroeder	Music Therapy	10
Anne Kemna	Music Therapy	2*
Kay Lawrence	Music Therapy	10*
Bernice Deloney	Library Assistant	10*
Sharon Pflantz	Dietician	4

* These individuals conduct classes in mainside therapy areas which are attended by Rehabilitation Unit patients along with patients from the mainside of the hospital. For this reason these hours cannot be used in calculating the time of these employees for purposes of arriving at a direct staff-patient ratio for the Rehabilitation Unit.

67. The following is a list of the merit system title, professional degrees and certifications, and years of experience of each of the Mainside professional staff identified on the charts on the previous page:

1. Arthur Lee, Jr. D.M.D.
   A. B.S., Psychology, Auburn University, 1956; D.M.D., University of Alabama, 1964.
   B. Five years work with patients at the Fulton State Hospital.

2. Kevan Whitsitt, D.D.S.
   A. B.S., University of Iowa, 1972; D.D.S., University of Iowa, 1975.
   B. Board Certification:
      1. Central Regional Board, 1976.
   C. Employed by Fulton State Hospital since November 1977.

3. Willie C. Piggee, Special Education Teacher
   A. B.S., Education, Philander Smith College, 9 hours of graduate work at Lincoln University, Jefferson City, Missouri.
   B. Life certification—Education (K-12).
   C. Seventeen and one-half years experience in mental health facilities.

4. Jane S. Rook, Special Education Teacher
   A. B.A., University of Maryland, 1945; M.Ed., University of Oklahoma, 1952.
   B. Life certification—S.D.E. and S.E.
   C. Twenty-one years experience in mental health facilities.

5. Don Kennison, Vocational Education Teacher

   A. High school diploma.

   B. Seven and one-half years experience in mental health facilities.

6. Samuel Sheldon, Vocational Education Teacher

   A. High school diploma; Attended ROCH. Institute of Technology, 1947-1949.

   B. Professional Certification:

      1. Industrial and technical teacher.

   C. Seven and one-half years experience in mental health facilities.

7. Shirley Olson, Activity Therapy Coordinator

   A. A.A., Blackburn College, 1943; B.S. in Occupational Therapy, University of Illinois, 1946.

   B. Registration with American Occupational Therapy Association and National Therapeutic Recreation Society; Therapeutic Recreation Specialist—1973-1977.

   C. Ten years experience in mental health facilities.

8. Gail Cunningham, Occupational Therapist III

   A. B.S., Occupational Therapy, University of Missouri, 1974.

   B. Member of Missouri Occupational Therapy Association and American Occupational Therapy Association.

   C. Six and one-half years experience in mental health facilities.

9. Ruth Ann Menneke, Supervisor, Volunteer Services

   A. B.S., Social Work, Central Missouri State University, 1972.

   B. Certified administrator of Volunteer Services through the Association for Administration of Volunteer Services.

   C. Seven years experience in mental health facilities.

10. Robert E. Meyer, Recreational Therapist I

   A. High school diploma.

   B. Member of National Therapeutic Recreation Society.

   C. Thirteen years, ten months experience in mental health facilities.

11. Jerry Holmes, Activity Aide II

   A. High school diploma.

   B. Thirteen years experience in mental health facilities.

12. Helen Kaufmann, Activity Therapist

   A. High school diploma.

   B. Nineteen years, nine months experience in mental health facilities.

13. Walter Wolking, Activity Aide II

   A. High school diploma.

   B. Eighteen and one-half years experience in mental health facilities.

14. Frank Schroeder, Activity Aide II

    A. High school diploma.

    B. Twelve years experience in mental health facilities.

15. Anne Kemna, Activity Aide III

    A. High school diploma.

    B. Twenty years experience in mental health facilities.

16. Kay Lawrence, Music Therapist III

    A. B.S., P.S.M., Cincinnati Conservatory of Music and University of Cincinnati, 1935.

    B. Missouri Life Teaching Certificate in Elementary and Secondary Levels.

    C. Sixteen years experience in mental health facilities.

16. Bernice Deloney, Library Assistant

    A. High school diploma.

    B. Eighteen years, nine months experience in mental health facilities.

17. Sharon Pflantz, Dietician

    A. B.S., Dietetics, University of Missouri, 1965.

    B. Registered Dietician, 1976; Member American Dietetics Association.

    C. Seven and one-half years experience in mental health facilities.

68. The following is a list of Mainside staff members, not previously listed in the stipulation, who, in the course of their regular duties, devote time to the Forensic Unit. The list also includes their merit system title and number of hours per week devoted to the Forensic Unit:

Name	*Title*	*Number of Hours Devoted Per Week to the Forensic Unit*
James K. Ritterbusch, M.D.	Superintendent	9.5
Hugh Schallenberger, Ph.D.	Assistant Superintendent II (Treatment)	15
Michael Benzen	Assistant Superintendent II (Administration)	4
Al Anderson	Hospital Management Assistant	4
Harry Lee	Chief Security Officer	5
Patricia Beyer, R.N.	Director of Nursing Services (Grad Nurse VI)	4
Lou Curit	Personnel Officer II	3
Don Bussel	Fire and Safety Supervisor	4

69. The following is a list of Mainside employees who supervise patients from the Rehabilitation Unit who participate in the Industrial Therapy Program at the Fulton State Hospital. These employees spend the time designated below supervising Rehabilitation patients who participate in the programs:

Name	*Speciality*	*Number of Hours Per Week Rehabilitation Patients Work Under Supervision of Employee*
Robert Meyers	Recreational Therapy	15
Harry D. Lee	Chief Security	6
Gail K. Cunningham	Occupational Therapy	14
Richard Kaufmann	Storekeeper	4

Roger Heislen	Forms Supervisor	25*
Richard E. Smith	Manager, Hospital Supply	16
Hoxsey O'Neal	Laundry Manager	40*
Betty Steinrouf	Storekeeper	36*
Kay Lawrence	Music Therapy	20
Shirley Olson	Occupational Therapy	7

* These figures indicate those groups containing mainside patients as well as Rehabilitation patients. For this reason these hours cannot be used in calculating the time of these employees for purposes of arriving at a direct staff-patient ratio for the Rehabilitation Unit.

C. Treatment Program

70. All patients in the Rehabilitation Unit are assigned to Program VI. The staff members who make up Program VI are as follows:

Name	*Number of Hours Worked per Week*
Dr. Edward Tellez, M.D.	Full Time
Scott DeClue, Psychology (Program Coordinator)	Full Time
Richard Strecker, Psychology Technician	Full Time
Laura Morrow, Social Service	Full Time
Susan Eidson, Social Service	Full Time
Scott Walker, Music Therapy	Part-Time (20 hrs/week)
Pauline Patrick, Occupational Therapy	Full Time
Carter Hawkins, Recreational Therapy	Full Time
Treva Fletcher, Recreational Therapy	Full Time
Paula Nickelson, Vocational Rehabilitation	Full Time
Robert Vegiard, Chaplain	Part-Time (5 hrs/week)
Richard Rummel, Chaplain	Part-Time (3 hrs/week)
Sara Hume, Industrial Therapy	Full Time

71. The following list describes the manner in which Psychiatric Aides I and II are assigned by shift in the

Rehabilitation Unit at the Fulton State Hospital. These figures do not necessarily mean that there are actually this many aides on the wards at any one time. These figures relect the distribution of funded Psychiatric Aide I and II positions by Ward. Daily adjustments are made for such things as annual leave, sick leave, and a seven day work week.

Location	*7-3 Shift*	*3-11 Shift*	*11-7 Shift*
2 South	3	3	3
3 South	6	6	5
6 South	2	2	1
10 South	1	1	1

72. The following is a list of the Rehabilitation Unit patients who were participating in various therapies at the Fulton State Hospital as of April 1, 1979:

1. Recreational Therapy—44 patients.
2. Occupational Therapy—25 patients.
3. Music Therapy—16 patients.
4. Education—15 patients.
5. Vocational Education—18 patients.
6. Industrial Therapy Assignments—25 patients.
7. Group Therapy—39 patients.
8. Individual Therapy—21 patients.

D. Patient Information

73. As of March 30, 1979, there were 71 patients residing in the Rehabilitation Unit at the Fulton State Hospital.

74. The racial breakdown of the 71 patients residing in the Rehabilitation Unit as of March 30, 1979, was as follows:

1. Black—19
2. White—52

75. The age breakdown of the patients residing in the Rehabilitation Unit as of March 30, 1979, was as follows:

Age Group	*Number*
Under 18 Years	0
18-21	6
22-25	11
26-35	27
36-45	13
46-55	7
Over 55	7

76. The following list describes the type of commitment of each resident of the Rehabilitation Unit as of March 30, 1979:

Type of Commitment	*Number of Patients*
Probate Court	6
Voluntary	4
Pretrial Evaluation (C-1)	1
Not Guilty by Reason of Mental Disease or Defect (C-3)	49
Criminal Sexual Psychopath (C-4)	11
Standard Non-Judicial	0
Juvenile Court	0
Not Competent to Stand Trial (C-2)	0
Transfers from the Missouri Department of Corrections (C-5)	0

77. The following is a list of the patient population on each Ward in the Rehabilitation as of March 30, 1979.

Ward	*Number of Patients*
2 South	17
3 South	22
6 South	19
10 South	13

IV.

Appropriations and Expenditures

78. For the first eight months of Fiscal Year 1979 (July 1, 1978 through February 28, 1979), the Accounting Department of Fulton State Hospital has calculated that the State of Missouri has spent $2,895,678.00 to operate the Biggs Building. The Accounting Department calculates that, during that same eight-month period, 58,208 separate patient days are attributable to the Biggs Building. Therefore, the per diem cost of operating the Biggs Building during that period of time was $49.75.

79. The Accounting Department for Fulton State Hospital has calculated that for the first eight months of Fiscal Year 1979 (July 1, 1978 through February 28, 1979), the State of Missouri spent $802,156.00 to operate the Rehabilitation Unit. The Accounting Department has calculated that 18,234 separate patient days can be attributed to the Rehabilitation Unit during that same eight-month period. Therefore, the per diem cost of operating the Rehabilitation Unit for the first eight months of Fiscal Year 1979 was $44.00.

80. During that same eight-month period of time, the per diem cost of operating GM & S Unit of Fulton State Hospital (the Acute Clinic) was $116.38. Also for that same period of time the per diem cost of operating the balance of Fulton State Hospital was $45.81.

81. The calculated cost of operating respectively the Biggs Building and the Rehabilitation Unit is based upon both direct and indirect costs.

82. Direct costs for both units were composed almost entirely of salaries. For the Biggs Building, from July 1, 1978 through February 28, 1979, $1,123,685.00 in direct costs were spent almost entirely for salaries of individuals em-

ployed exclusively within the Biggs Building. For that same period of time, $243,437.00 was spent almost entirely on salaries of persons employed exclusively by the Rehabilitation Unit. As an additional increment of direct cost, $493,401.00 was spent during that eight-month period of time as an allocation to Forensic Administration and Support. This accounting entry provides for the payment of salaries for the Unit Director of the Forensic Unit, for all Social Service personnel of the Forensic Unit, for the Director of Psychiatric Services for the Forensic Unit, etc. This latter figure was proportioned among the Biggs Building and the Rehabilitation Unit on the basis of total patient days for each unit.

83. The remainder of the costs attributed by the Accounting Department of Fulton State Hospital to both the Biggs Building and the Rehabilitation Unit were classified as indirect costs or overhead.

84. Indirect costs include all food, utilities, supplies and other accounting items which reflect the actual charged usage of those items by both the Biggs Building and the Rehabilitation Unit. Indirect costs also include a proportionate share of costs attributable to the Biggs Building and the Rehabilitation Unit as a result of the operation of other departments of Fulton State Hospital which departments service the entire hospital.

85. Indirect costs or general overhead attributed to the Biggs Building and the Rehabilitation Unit include a proportionate share of the cost of operating the following Fulton State Hospital Departments:

Accounting	Education
Activity Therapy	Housekeeping
Administration	Laundry
Audio Visual	Maintenance & Power Plant
Barber & Beauty Shops	Motor Pool

Central Medical Services	Patient Payroll
Central Professional Medical Services	Personnel
	Pharmacy
Chaplaincy	Professional Service Coordinator
Clerical Pool	Registrar–Medical Records
Communications	Security–Fire & Safety
Dairy	Staff Development
Data Processing	Stores & Supply
Dietary	Volunteer Service

86. Projecting the costs attributable to the operation of the Biggs Building from July 1, 1978 to February 28, 1979, over the entire present fiscal year, it is predicted that $4,903,802.00 will be spent to operate the Biggs Building. This figure assumes no significant changes in the population of the Biggs Building during the remaining four months of the fiscal year. The figure also includes a reduction to compensate for possible over expenditures during the first eight months of the fiscal year.

87. Making the same calculations for the Rehabilitation Unit, it is projected that $1,133,444.00 will be spent to operate the Rehabilitation Unit. This projected figure is based on the same assumptions and takes into account the same facts as that figure projected for the Biggs Building.

V.

Miscellaneous

88. The parties do not waive their evidentiary objections to the facts stipulated in this document.

89. The parties agree that the Court may consider all of the interrogatories and the parties' responses thereto as part of the record in this case.

SIGNATURES OMITTED IN PRINTING

VISITING IN THE MAXIMUM SECURITY UNIT

Effective 1 May 1979

GENERAL RULES

1. Articles and parcels, clothing, radios, etc., may not be given to patients but must be left with the supervisor or receptionist, who will inspect and deliver them. All envelopes will be opened and inspected, sealed or otherwise.

2. No persons under fifteen (15) years of age will be permitted to visit in the Biggs visiting room.

3. We require identification to the satisfaction of the receptionist. If she has any doubt about advisability of a visit, she will check with the supervisor, if the supervisor has any doubt, he will check with Dr. Bratkowski and/or Joseph Mangini, Unit Director. In the event a visitor acts suspiciously either within, or outside the building, the security officer will be notified and also Dr. Bratkowski, and/or Joseph Mangini, Unit Director.

4. Non-alcoholic shaving lotion, hair tonic, deodorant, etc. will be permitted but only if in plastic containers. It should be limited to not more than an eight (8) ounce container.

5. Visits will be limited to one-half hour whenever the Visiting Room is crowded. Otherwise, you may visit with the patient the entire length of the visiting period. As many family members or friends may visit at one time with the patient, providing there is room in the visiting room.

6. Visiting hours are every week day *afternoon* only, from 1:00 to 2:40 p.m. and on Saturday, Sunday,

and holidays, 9:00 to 10:45 a.m. and 1:00 to 2:40 p.m.

7. Cash is not allowed in this unit. Our canteen uses coupons. You may leave money for the patient at the Main Administration Building. The patient then orders Canteen Books from his own account.

FOOD AND TOBACCO ITEMS

The items listed will be the maximum amount and the only items allowed in the food and tobacco category. The patients may purchase a variety of items from the canteen (see #7 above).

1. Food:

   A. Carry out or quick order lunches and drink: (Dairy Queen, Hardees, etc.) Food is never allowed in the Visiting Room.

      Must be an amount that can be reasonably consumed by one individual.

   B. Instant Coffee: Up to twelve (12) ounces—sealed container only—coffee in unsealed container will not be allowed.

   C. Special Occasions: Cakes near the residents' birthdays: they must be on wax paper or cardboard. No foil, metal or glass please. The hospital reserves the right to make a cross-cut in cakes, etc.

      Christmas: Cookies and candy, homemade or the store variety, fruit or pies and nuts (no

shells please), starting three (3) weeks before Christmas through New Years Day.

2. Tobacco

   A. Cigarettes: All brands up to two cartons.

   B. Cigars: All Brands—reasonable quantities, up to one box (50).

   C. Chewing Tobacco: All Brands—reasonable quantities, (one carton, 12 packs). Tobacco products must be unopened.

We respectfully request your compliance with the above stated rules and regulations, in order to provide an efficient Visiting Procedure and maintain effective sanitary standards in the building.

REHABILITATION UNIT POLICY

Visiting Policy

1. Hours: 9 a.m.—11 a.m., 1 p.m.—4 p.m., 7 p.m.—8 p.m.

2. No ex-patients or employees to visit without permission from the Team.

3. Children under 14 years of age are not allowed to visit on wards.

4. Families with children are to visit in the Canteen and children must be supervised by parents at all times.

EXHIBIT B TO STIPULATION

No. 75 CV 87-C

19 July 1978

UNIT POLICY FOR USE OF TELEPHONE
BY BIGGS PATIENTS

All requests by patients to use the telephone will be screened by the team's social worker or psychologist.

Phone calls will be approved by the social worker, psychologist, or nursing supervisor, after hours, in emergency situations or when it is determined to be beneficial to the patient. If a matter can be handled by mail, no phone calls will be approved.

If an emergency phone call is approved, the social worker or psychologist will record this in the patient's chart and make arrangements for the call to be placed. If a call is to be placed after 4:30 p.m. or on a weekend or holiday to a number within Missouri, the WATS line may be used. Calls outside Missouri or calls placed between 8:00 a.m. and 4:30 p.m. on a regular working day must be placed collect.

Patients may receive phone calls only from their attorneys after prior arrangements have been made through the team social worker or psychologist. When any other incoming phone calls for patients are received, a message must be given to a staff member to be relayed to the patient.

Patients may place collect phone calls to their attorneys only before a 90 day staffing, before court appearance, or other legal technicalities regarding their case.

Phone calls to relatives will be allowed only in case of an emergency or in case where it is determined to be beneficial to the patient.

Joseph Mangini
Forensic Unit Director

EXHIBIT C TO STIPULATION
No. 75 CV 87-C

REHABILITATION UNIT POLICY

Telephone Policy

1. May call lawyer any time.
2. May call family once weekly (collect).
3. Patients may not receive calls from ex-patients or employees without permission from Team.
4. Calls limited to 3 minutes.
5. Pay phones at Administration Building may be used PRN during pass time.
6. Callers must identify themselves and each caller may call only once a night.

EXHIBIT D TO STIPULATION
No. 75 CV 87-C

OPERATING REGULATION NO. 133

Revised June 10, 1978

MISSOURI
DEPARTMENT OF MENTAL HEALTH

TO: Deputy/Division Directors
Superintendants/Center Directors

FROM: C. Duane Hensley, Ph.D., Director

SUBJECT: Restraints and Seclusion

II. *POLICY*

The Department recognizes that occasionally restraints and/or seclusion might be necessary environmental restrictions to provide appropriate care and treatment to avoid injuries to self or others, or cause extensive property damage, after other alternatives have been

exhausted and thoroughly documented in the resident's clinical record.

The use of restraints and seclusion shall not be used for the following:

1. punishment;
2. for the convenience of staff; or
3. as a substitute for program.

If restraints and/or seclusion are clinically determined to be specific treatment intervention to resolve recurring behavioral problems, then it shall be so stated in the treatment plan. Each treatment plan shall be reviewed frequently to ensure that the resident's plan is being implemented in the least restrictive environment appropriate to the resident's needs.

While isolated and emergency use of restraints or seclusion may not require a treatment plan, all alternatives of either shall be exhausted and so documented in the resident's clinical record. Whenever possible, *the use of restraints and seclusion should be determined before the fact and not after the fact.*

All use of restraints and seclusion shall be reviewed by the treatment team and by a committee as appointed by the Superintendent or Center Director.

III. *DEFINITIONS*

A. *Restraints.* Restricting a resident's ability to react to his environment by temporarily limiting freedom of body movement, all or partial limb movement, by use of physical or mechanical restraints of the following types:

1. Cuffs—leather, plastic, or steel restraints locked to wrists or ankles which limit limb movement.

2. Mittens—used to prevent resident's use of fingers in self abuse or harm to others.

3. Arm Boards or Splints—boards or splints used to prevent bending the arms for the purpose of self abuse.

4. Safety Braces—posey belts, folded bed sheets flannel or muslin ties, chairboards (example: geriatric chairs), bed ties, bed rails, tying jackets.

5. Crib or Bed Enclosures—includes netting or attachement to crib or bed which tend to make an enclosed space of the crib or bed.

B. *Seclusion.* A means of restricting a resident's environment by removing him from social contact by placing him/her in a locked area. This does not apply to locked security wards or situations in which a resident may be temporarily placed in a locked room solely as protection from injury from other residents.

C. *Mental Health Professional.* For purposes of ordering and/or approving the use of restraints or seclusion, qualified mental health professionals will include only the following: physician, registered nurse, master's level social worker or master's level psychologist, or other qualified personnel as designated by the Superintendent or Center Director.

D. *Qualified Ward Personnel.* Each facility shall have their own definition of qualified ward personnel as a part of their restraints and seclusion regulation.

IV. *PROCEDURES*

A. *Ordering of Restraints or Seclusion*

1. A resident may be physically restrained or placed in seclusion upon the request of qualified ward personnel as defined in the facilities' policies and procedures. The request shall be approved by a qualified mental health professional. The request, as well as the approval, shall be appropriately documented in the resident's clinical record.

2. Emergency use of restraints or seclusion shall be for no more than thirty (30) minutes, during which time the qualified mental health professional shall have been contacted and consulted. All written orders shall be effective for no more than twenty-four (24) hours and must be renewed if restraints or seclusion are to be continued.

3. The use of restraints for medical and safety reasons rather than control purposes, such as safety braces and crib enclosures, shall be the responsibility of the attending physician. The medical chief of staff shall determine policy of ordering restraints under this category and should determine the review practices according to medical standards.

B. *Monitoring*

1. While in restraints or seclusion, the patient shall be seen at least every fifteen (15) minutes by qualified ward personnel who will chart the resident's physical and behavioral condition every hour. Other necessary measures shall be

taken to ensure that appropriate care and treatment of the resident is maintained and appropriately documented in the resident's clinical record.

2. When a resident is placed in restraints or seclusion, the name and the time the restraints or seclusion began shall be indicated on the door of the room. The room shall have a window in the door or elsewhere for observation purposes.

3. A list of the residents in seclusion and/or restraints shall be kept at the nurses' station or other central area in order that information will be readily accessible and visible for immediate action in case of emergency.

C. *Reporting*

1. Incidents of restraint or seclusion shall be recorded in a manner to facilitate their appropriate review. Reporting should be accomplished in a way as to guarantee that all incidents of restraint or seclusion may be appropriately reviewed. The format for reporting shall be specified in the facilities' written policies and procedures. At least the following information shall be included:

   a. A brief statement of how restraints or seclusion is to be used as a part of the resident's treatment plan, if applicable, and what the expected results of their use are to be.

   b. A description of the resident's behavior that required the use of restraints or seclusion.

c. Documentation of alternative interventions that were attempted and considered prior to the use of restraints or seclusion and the results of that intervention.

d. An indication of the duration of restraints or seclusion, what the resident was told about the reason for their use, and describe resident-staff interaction during and after the incident.

2. Restraints used for safety and medical purposes (as outlined in the definition of safety braces, crib and bed enclosures) shall not be recorded on the restraints and seclusion report form; however, they should be ordered and documented in the resident's clinical record.

D. *Facility Review*

1. Each incident of restraint or seclusion shall be reviewed on two levels within the facility, first, the treatment team and second, a facility review committee. The treatment team shall review all incidents involving residents within their care. A facility review committee shall examine the utilization of restraints or seclusion on a monthly basis. Representatives from the administration, medical service, and the Human Relations Committee shall be part of the facility-wide committee. Other members may be appointed by the Superintendent or Center Director.

2. A facility review committee shall review, on an annual basis, the facility's restraints and seclusion plan to determine its effectiveness and recommend to the Superintendent or Cen-

ter Director necessary changes in the plan. Changes approved by the Superintendent or Center Director shall be forwarded to the Director of the Division of Comprehensive Psychiatric Services or the Director of the Division of Mental Retardation—Developmental Disabilities, as appropriate for review and final approval. Each Division Director shall notify the Director of the Department in writing when each plan has been filed or revised. Each Division Director shall review annually each plan and direct necessary adjustments or modifications.

E. Reporting to Central Office will continue as required by the previous operating regulation.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

STANDARD PRETRIAL ORDER NO. 2

Including Stipulation of Uncontraverted Facts

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 20 of this Court,

IT IS ORDERED

I. This is an action in which plaintiffs, individually and on behalf of all others similarly situated, seek to have this Court declare unlawful and enjoin certain policies and practices of the defendants, which plaintiffs allege cause their involuntary confinement without providing them adequate treatment for their mental illnesses.

The defendants expressly deny that any of their policies and practices caused the involuntary confinement of the plaintiffs without providing them adequate treatment for their mental illnesses.

The named plaintiffs are Thomas Eckerhart, Ronald Ambach, Rommie Jones, and Michael O'Bradovich. The parties have stipulated that the class represented by the plaintiffs include all patients involuntarily confined to the Forensic Unit, Fulton State Hospital, on such date as the Court may render any judgment disposing of all allega-

tions raised by the plaintiffs, or any portion thereof. [The class specifically excludes patients residing in the Forensic Unit exclusively for pretrial psychiatric observation purposes and voluntary patients confined pursuant to the provisions of Section 202.783, RSMo 1969].

The named defendants are C. Duane Hensley, a past Director of the Missouri Department of Mental Health, James K. Ritterbush, Superintendent of Fulton State Hospital, Edward Tellez, Clinical Director of the Rehabilitation Unit of the Fulton State Hospital, Henry Bratkowski, Clinical Director of Biggs Building of Fulton State Hospital, and the members of the Missouri Mental Health Commission as of the date of the filing of the Amended Complaint. Dr. Hensley is no longer Director of the Department of Mental Health. Drs. Tellez and Bratkowski, although still employed by Fulton State Hospital, no longer hold the title of Clinical Director.

The Complaint was filed on April 11, 1975. Defendants filed their Answer to the original complaint on May 16, 1975. An Amended Complaint was filed on August 3, 1977. The defendants filed their Answer to the Amended Complaint on August 12, 1977. The Joint Stipulation of the Parties with respect to the definition of the class was entered into on March 18, 1977. On September 16, 1977, this Court certified this case as a class action.

II. Federal jurisdiction has been invoked by the plaintiffs pursuant to the provisions of Title 42 U.S.C. §1983, Title 28 U.S.C. §§1343(3), 2201, 2202, and the First, Fourth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution. The defendants have specifically denied that the plaintiffs have a cause of action under any of the federal constitutional and statutory grounds above stated.

III. The following facts are admitted, and require no proof: See enclosed herewith the parties "Stipulation of Uncontraverted Facts".

IV. The reservations as to the facts which were cited in Paragraph III above are as follows:

The parties have reserved their evidentiary objections to all stipulated facts.

V. The following facts, although not admitted, are not to be contested at the trial by evidence to the contrary:

None.

VI. The following issues of fact, and no others, remain to be litigated upon the trial:

1. Does the Biggs Building[1] provide a humane and therapeutic physical and psychological environment?

2. Are the living conditions and environment in the Biggs Building inhumane?

3. Does the Forensic Unit provide more than custodial care to its patients?

4. Are the living conditions, physical and psychological environments in the Biggs Building so inadequate as to deny patients treatment and the opportunity to improve their mental condition?

5. Do the patients committed to the Forensic Unit receive adequate care and treatment to improve or give them an opportunity to improve their mental conditions?

6. Is the staff assigned to the Forensic Unit so inadequate as to render treatment impossible?

7. Are there sufficient numbers of qualified staff in the Forensic Unit to provide a minimally adequate level of the patients?

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[1] Unless otherwise indicated, all factual issues relate to both the Biggs Building and the Rehabilitation Unit.

8. Are patients inappropriatedly placed in the Forensic Unit?

9. Are patients maintained in the Forensic Unit for periods of time longer than is therapeutically necessary and thus deprived of treatment in the least restrictive environment appropriate to the individual conditions and needs?

10. Do patients have individualized treatment plans which reflect minimally adequate treatment?

11. Do patients receive individualized treatment programing?

12. If patients do receive individualized treatment programing, is it sufficient to provide minimally adequate treatment?

13. Are patient medical files kept in such manner as to provide minimally adequate treatment?

14. Do mentally retarded and brain damaged patients have individualized habilitation plans which reflect minimally adequate treatment?

15. Do mentally and brain damaged patients receive individualized habilitation programing?

16. If mentally retarded and brain damage patients do receive individualized habilitation programing, is it sufficient to provide minimally adequate treatment?

17. Are seclusions and restraints sometimes necessary in a maximum security institution?

18. Are seclusions and restraints used in a countertherapeutic manner which is inconsistent with the goals of treatment?

19. Do the present uses of seclusions and restraints in the Forensic Unit comprise an unreasonable danger to the physical well-being of the patients?

20. Is the manner and use of medication counter-therapeutic and inconsistent with the goals of treatment?

21. Do the present medication policies and procedures prevalent in the Forensic Unit comprise an unreasonable danger to patients?

22. Is defendants' mail policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic?

23. Is the Biggs Building visitation policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic?

24. Is the Biggs Building telephone policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic?

VII. All parties have filed original and supplemental lists of exhibits. The parties have entered into an agreement with respect to matters relevant to the exhibits included in their original exhibit lists. The parties have not entered into agreement or made stipulations with respect to the exhibits included in their amended or supplemental exhibit lists. With the exception of the explicit agreements made with respect to the exhibits included in the original exhibit lists of the parties, the parties have reserved all evidentiary objections to all exhibits to be offered at trial.

VIII. The following issues of law, and no others, remain to be litigated upon the trial:

1. Does the due process and equal protection clauses of the Fourteenth Amendment guarantee the right to treatment for patients residing in the Forensic Unit, Fulton State Hospital?

2. If the Fourteenth Amendment does guarantee the right to treatment for mental patients generally, does that

right extend to patients residing in the Forensic Unit by reason of their involvement with the criminal justice system?

3. Does the Eighth Amendment apply to patients residing in a Forensic Unit of a state mental institution, and, if so, do the conditions prevalent in the Forensic Unit violate that constitutional provision?

4. If the Fourteenth Amendment guarantees the right to treatment for mental patients residing in the Forensic Unit, does the provision of humane care and an opportunity for a more speedy discharge than available through the criminal justice system satisfy the Constitution?

5. If the Fourteenth Amendment guarantees the right to minimally adequate treatment, is this right being violated by conditions prevalent in the Forensic Unit?

6. If the Fourteenth Amendment guarantees the right to adequate treatment, is this right being violated by conditions prevalent in the Forensic Unit?

7. Does the Constitution guarantee to patients residing in the Biggs Building the right to a safe and humane environment?

8. If the Constitution guarantees the right to a safe and humane environment, is that guarantee satisfied by the living conditions prevalent in the Biggs Building?

9. Does the Biggs Building mail policy and practice violate the First, Fourth, Ninth, or Fourteenth Amendments?

10. Does the Rehabilitation Unit mail policy and practice violate the First, Fourth, Ninth, or Fourteenth Amendments?

11. Does the Biggs Building telephone policy and practice violate the First, Fourth, Ninth, or Fourteenth Amendments?

12. Does the Rehabilitation Unit telephone policy and practice violate the First, Fourth, Ninth, or Fourteenth Amendments?

13. Does the visitation policy and practice of the Biggs Building violate the Fourteenth Amendment?

14. Does the visitation policy and practice of the Rehabilitation Unit violate the Fourteenth Amendment?

15. May the nature of the population of the Forensic Unit be taken into account when determining what constitutional guarantees are afforded to the plaintiff class?

16. Does the Fourteenth Amendment require that patients residing in the Forensic Unit receive treatment in the least restrictive environment required by the patients individual needs?

17. If the Fourteenth Amendment requires that patients residing in the Forensic Unit receive treatment in the least restrictive environment required by the patients individual needs, is this right violated by the conditions prevalent in the Forensic Unit?

18. Does the Fourteenth Amendment require that mentally retarded patients residing in the Forensic Unit receive habilitation?

19. If the Fourteenth Amendment requires that mentally retarded patients residing in the Forensic Unit receive habilitation, is this right violated by the conditions in the Forensc Unit?

20. Does the seclusion and restraints practices prevalent in the Forensic Unit violate the Fourteenth Amendment?

21. Have any of the defendants named in this lawsuit violated any provision of the United States Constitution for reason of their involvement with the Forensic Unit?

IX. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice, or to implement Rule 26(e), Fed.R.Civ.P.

April 30, 1979

ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE

SIGNATURES OMITTED IN PRINTING

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

FILED AUGUST 11, 1979

TITLE OMITTED IN PRINTING

OPINION

This is an action in which plaintiffs seek declaratory and injunctive relief regarding treatment and conditions at Fulton State Hospital, Fulton, Missouri. This case was certified as a class action under F.R.Civ.P. 23(b)(2) on September 16, 1977. Plaintiffs represent "all patients involuntarily confined to the Forensic Unit, Fulton State Hospital, on such date as any judgment may be rendered herein disposing of all allegations raised by the plaintiffs, or any portion thereof."[1]

Defendants are public officials responsible for the supervision and operation of the Forensic Unit and members of the Missouri Mental Health Commission. Named defendants include Dr. C. Duane Hensley, past Director of

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[1] The class designation is based on the parties' stipulation, filed March 21, 1977. Patients temporarily confined in the Forensic Unit for the purpose of pretrial psychiatric observation and evaluation pursuant to §552.020, RSMo, are specifically excluded from the class. Also excluded are patients who are in the Forensic Unit solely as a result of voluntary commitment pursuant to §202.783, RSMo (repealed 1978) (see §202.115, RSMo, effective Jan. 2, 1979) and not by court order.

the Missouri Department of Mental Health, and Dr. James K. Ritterbusch, Superintendent of Fulton State Hospital.[2]

The Forensic Unit consists of two residential units, one known as the Marion O. Biggs Building for the Criminally Insane ("Biggs Building") and the other known as the Rehabilitation Unit. The Biggs Building houses patients who, in addition to being mentally ill or mentally disabled, have been deemed to be dangerous to themselves or others to an extent which requires that their care and treatment be conducted under conditions which provide maximum security. The Biggs Building is the only unit of the Missouri Department of Mental Health housing solely maximum security patients. The Rehabilitation Unit also houses patients who have been determined to represent a danger to themselves or others. As a general matter, the conditions of confinement in the Rehabilitation Unit are less restrictive than those prevailing in the Biggs Building. As patients are judged to no longer require confinement in a maximum security setting, they are usually transferred from the Biggs Building to the Rehabilitation Unit where they reside in progressively less restrictive wards until they are transferred to another institution or are discharged.

The patients confined in the Forensic Unit were committed under a variety of statutory provisions. The following describes the types of commitments and approxi-

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[2] Dr. Hensley no longer holds the office of Director. F.R.Civ.P. 25(d) provides for the automatic substitution of his successor in office; to date, however, no permanent successor has been appointed. Also named as defendants are Dr. Edward Tellez, Clinical Director of the Rehabilitation Unit at Fulton State Hospital, and Dr. Henry Bratkowski, Clinical Director of the Biggs Building at Fulton State Hospital. Drs. Tellez and Bratkowski, although still employed by Fulton State Hospital, no longer hold the title of Clinical Director.

mate percentages of the patient population as of March 30, 1979:

Type of commitment	*Percentage*
Involuntary civil commitment by Probate Court[3]	15
Not guilty by reason of mental disease or defect[4]	50
Pretrial psychiatric observation and evaluation[5]	12
Criminal sexual psychopath[6]	10
Transfers from the Missouri Department of Corrections[7]	2
Incompetent to proceed with trial[8]	7
Commitment by Juvenile Court[9]	1
Voluntary commitment[10]	3

Plaintiffs contend that defendants are in violation of the eighth and fourteenth amendments to the United States Constitution by their failure to provide an adequate program of care and treatment for patients confined in the Forensic Unit. Plaintiffs also claim that certain of defendants' policies and practices regarding visitation, telephone, mail, and the use of seclusion and restraints, violate patients' constitutional rights.

This Court has jurisdiction under 28 U.S.C. §1343(3).

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[3] §202.807, RSMo (repealed 1978) (see §§202.121-.147, RSMo, effective Jan. 2, 1979). These patients are usually transfers from other facilities of the Missouri Department of Mental Health due to violent or aggressive behavior problems. Testimony of Joseph Mangini, Forensic Unit Director.

[4] §552.040, RSMo.

[5] §552.020, RSMo.

[6] §202.730, RSMo.

[7] §552.050, RSMo.

[8] §552.020, RSMo.

[9] §211.201, RSMo.

[10] §202.783, RSMo. (repealed 1978) (see §202.115, RSMo., effective Jan. 2, 1979).

I.

CONSTITUTIONAL RIGHT TO TREATMENT

In Welsch v. Likins, 550 F.2d 1122, 1125, 1126 n.6 (8th Cir. 1977), the Eighth Circuit recognized that noncriminal mentally ill or retarded patients committed to state institutions without their consent have a federal constitutional right to treatment. This recognition was premised upon the district court's holding that the due process clause of the fourteenth amendment requires that mentally retarded persons who have been civilly committed to state mental institutions be afforded at least minimally adequate treatment. Welsch v. Likens, 373 F. Supp. 487, 491-97 (D. Minn. 1974). A constitutional right to treatment for mental patients has been recognized in several other circuits. Bowring v. Godwin, 551 F.2d 44, 48 n.3 (4th Cir. 1977) (dicta); Scott v. Plante, 532 F.2d 939, 947 (3d Cir. 1976) (states a claim); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (dicta).

Defendants argue that the constitutional right to treatment of civilly committed mental patients is not well established in the law. *Rouse* v. *Cameron, supra,* the seminal case in the field, was decided on statutory grounds. "[W]e need not resolve the serious constitutional questions that Congress avoided by prescribing this right." *Id.* at 455. Adequate treatment was first held to be the *constitutional* right of civilly committed mental patients in Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt* v. *Aderholt, supra. Wyatt* involved patients who were generally

> involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings. When patients are so committed for treatment purposes they

> unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. Rouse v. Cameron, 125 U.S.App. D.C. 366, 373 F.2d 451; Covington v. Harris, 136 U.S. App.D.C. 35, 419 F.2d 617.

Id. at 784. Defendants point out that Judge Johnson's holding in *Wyatt* relies on cases from the District of Columbia Circuit interpreting statutory rights under the District of Columbia Code.

Wyatt v. *Stickney* was affirmed by the Fifth Circuit, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), on the basis of its earlier decision in Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974). In *Donaldson* v. *O'Connor*, plaintiff was involuntarily committed to a state mental hospital for fourteen and one-half years. After his release, he sought to recover damages under 42 U.S.C. §1983 from hospital and state mental health officials for their failure to provide him with psychiatric care in violation of his claimed constitutional right to treatment. The Fifth Circuit affirmed a judgment for plaintiff and held that the only constitutionally permissible justification for civil commitment of a nondangerous person to a state mental hospital is to provide treatment and that such persons have a constitutional due process right to such treatment.[11]

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[11] The Fifth Circuit cited three grounds for civil commitment to mental institutions: danger to others, danger to self, and the need for treatment, care or supervision. Confinement by the state was justified as an exercise of the police power (danger to others or danger to self) or as an act by the state as *parens patriae* (danger to self or need for treatment). The first part of the court's two part right to treatment theory concerned the *parens patriae* rationale; if a person is confined by reason of need for treatment, due process requires that treatment in fact be provided. Jackson v. Indiana, 406 U.S. 715 (1972). The second part of

(Continued on next page)

The Supreme Court vacated the judgment of the Fifth Circuit in O'Connor v. Donaldson, 422 U.S. 563 (1975). Defendants contend that the vaction of the Fifth Circuit's opinion in *Donaldson*, specifically depriving that opinion of precedential effect,[12] brings into question the validity of the entire theory of a constitutional due process right to treatment. The Eighth circuit has not read *O'Connor* v. *Donaldson* in that way[13] and neither does this Court. The single issue decided by a unanimous Supreme Court in *O'Connor* v. *Donaldson* was that mental illness alone is not a sufficient justification to involuntarily confine a person who is not dangerous to others and can live safely in freedom. However, what may or may not be a constitutionally adequate justification for the involuntary confinement of the mentally ill or retarded is not at issue in this case. The Supreme Court concluded that the constitutional questions raised in this case were not present in *O'Connor*

Footnote continued
the theory treats both the police power and *parens patriae* rationales. The court reasoned that where confinement by the state is not accompanied by fundamental procedural safeguards of the criminal justice system, there must be a *quid pro quo* provided by the government to justify involuntary confinement, the *quid pro quo* in the case of mental patients being treatment. 493 F.2d at 520-22. It was the *quid pro quo* portion of the Fifth Circuit's theory that was specifically criticized by the Chief Justice in O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C. J., concurring).

[12] 422 U.S. at 577 n.12.

[13] It should be said that the constitutional right of a non-criminal committed to a mental institution to be treated for his condition is probably clearer today than it was in February, 1974. While the Supreme Court has not yet held that such a right exists, *cf. O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), its existence was recognized in *Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974), and in its companion case of *Burnham* v. *Department of Public Welfare*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057, 95 S.Ct. 2680, 45 L.Ed.2d 709 (1975).

Welsch v. Likens, 550 F.2d 1122, 1126 n.6 (8th Cir. 1977).

v. *Donaldson*. "Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or others have a right to treatment upon compulsory confinement by the State. . . ." 422 U.S. at 572.[14]

Defendants further argue that any constitutional right to treatment does not apply to the class of plaintiffs in this case. The great majority of the patients confined in the Forensic Unit came to be there by reason of their involvement in the criminal justice system. Prior to their commitment, these individuals were accused of serious crimes, including acts of violence. Many of those patients who were not accused of violent criminal acts prior to their commitment are transfers from other state mental health facilities, in which they could not safely reside due to violent or aggressive behavior. Defendants maintain that the dangerous character of the type of patient in the Forensic Unit provides a constitutionally acceptable basis for confinement *other* than for the provision of treatment. Therefore, say defendants, the State may confine such persons, in the exercise of its police power, for their own protection as well as for the protection of others, without being constitutionally required to provide treatment.[15] Defendants also point out that the *Wyatt* right to treatment cases did not involve a maximum security facility or patients committed because of their danger to themselves or others.

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[14] There was a jury finding that Donaldson was neither dangerous to himself nor dangerous to others. 422 U.S. at 573.

[15] Defendants cite the separate opinion of the Chief Justice in *O'Connor* v. *Donaldson*:

> There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant anti-social acts. . . .

422 U.S. at 582-83 (separate opinion of Burger, C.J.).

Federal courts have previously recognized a constitutional right to treatment in patients similar to those included in the plaintiff class. Scott v. Plante, 532 F.2d 939 (3d Cir. 1976) (incompetent to stand trial); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (not guilty by reason of insanity); United States v. Pardue, 354, 354 F. Supp. 1377 (D. Conn. 1973) (incompetent to stand trial); Davy v. Sullivan, 354 F. Supp. 1320 (M.D. Ala. 1973) (three judge court) (criminal sexual psychopath); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973) ("sexually dangerous person"). In Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974), and Davis v. Balson, 461 F. Supp. 842 (N.D. Ohio 1978), the court held that the patients at Lima State Hospital, "a maximum security hospital for the criminally insane" operated by the Ohio Department of Mental Health and Mental Retardation, have a constitutional right to treatment. The holding in *Davis*, which was based on *Wyatt* v. *Stickney*, *supra*, concerned a patient population in many respects identical to that of the Forensic Unit. *Davis* v. *Balson*, 431 F. Supp. at 849-50.

This Court has no quarrel with defendants' contention that the state may confine the dangerous mental patient against his will in order to protect both society and the patient from his violent behavior. However, that well-settled justification for involuntary confinement does not dispose of the right to treatment issue. The mentally ill or retarded person who is committed to a state institution, be he dangerous to others, to himself, or not at all, is set apart from society. He is isolated from whatever opportunity he might have had to get treatment for his illness or mental disability had he remained at liberty. Confinement in a state mental hospital *absolutely forecloses* receipt of any treatment except that which the state chooses to provide. To confine the mental patient against his will

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no doubt entails a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504 (1972). To withhold all opportunity for treatment may condemn him to a lifetime of hopeless mental illness, surely a greater deprivation. The Court therefore concludes that due process requires that the class of patients in this case, who have been involuntarily committed to a state mental hospital, be provided with such treatment as will give each of them a reasonable opportunity to be cured or to improve his mental condition. Of course, the fourteenth amendment does not require the state to do what is clearly unreasonable or impossible.[16]

The fact that plaintiffs have been deemed dangerous does not deprive them of a constitutional right to treatment, as defendants contend. On the contrary, if a mental patient is involuntarily confined because he is dangerous, due process requires a specific focus to the treatment which is his right. Treatment efforts must be directed to that aspect of his behavior which caused him to be classified as dangerous so that he has a reasonable opportunity to be eventually discharged from maximum security confinement.[17] To hold otherwise would certainly "transform the

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[16] This record demonstrates that there are patients suffering from mental illnesses for which present medical knowledge can provide little, if any, effective treatment. It follows that the involuntary commitment of a person not reasonably likely to benefit from treatment would not deprive him of realistic treatment opportunities available outside the state mental hospital. Therefore, the state's inability to provide a dangerous person with a reasonable opportunity to be cured or to improve his mental condition because no effective treatment is known would not render unconstitutional his involuntary confinement for the protection of himself or others.

It is not necessary to reach plaintiff's eighth amendment claim.

[17] *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972):

At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

(Continued on next page)

hospital into a penitentiary where one could be held indefinitely for no convicted offense." Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1950).

II.

THE CONSTITUTIONAL STANDARD

Defendants are correct that the Constitution does not impose a requirement of "optimal" or "good" treatment. "[T]he possibility of better treatment does not necessarily prove that the one provided is unsuitable or inadequate." *Rouse* v. *Cameron*, 373 F.2d at 451. The patient committed against his will has a *constitutional* right only to that treatment as is minimally adequate to provide him a reasonable opportunity to be cured or to improve his mental condition. *Welsch* v. *Likins, supra; Wyatt* v. *Stickney, supra.* Essential elements of minimally adequate treatment include a humane physical and psychological treatment environment, sufficient numbers of qualified staff, and an individual treatment plan for each patient. *Watkins* v. *Davis, supra; Wyatt* v. *Stickney, supra.*

In determining whether the treatment provided patients in the Forensic Unit is constitutionally adequate,

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Footnote continued

Defendants' policy is not to the contrary.

> Any patient who is institutionalized against his wishes shall be entitled to adequate appropriate treatment. . . . For those committed to maximum security facilities, however, another element is added, namely, the right to treatment for that aspect of his or her behavior for which he was classified as dangerous and judged in need of maximum security. . . . [I]t is even more important to have a treatment program designed to treat the dangerousness in individuals in order that they can safely progress to less restrictive facilities for continuation of their treatment for psychiatric symptoms as soon as possible.

Missouri Department of Mental Health, Standards, Psychiatric Hospitals and Clinics 114 (Nov. 1, 1975).

this Court is acutely aware that it is ill-equipped to deal with the complex problems of administering the maximum security unit of a state mental hospital. *See* Procunier v. Martinez, 416 U.S. 396 (1974). The courts must give deference in such matters to the solutions of the officials who are trained in the operation of such facilities and are charged with that responsibility, particularly when the problems are medical in nature. Negron v. Preiser, 382 F.Supp. 535 (S.D.N.Y. 1974). It has been repeatedly confirmed that the role of the federal courts is not to sit as supervisor or administrator of state-run institutions. *E.g., Meachum* v. *Fano,* 427 U.S. 215 (1976). However, it is the duty of this Court to inquire whether the practices or conditions in a particular institution violate constitutional prohibitions or fail to provide what may be constitutionally required. *See Procunier* v. *Martinez, supra. See also* Bell v. Wolfish, 47 U.S.L.W. 4507 (U.S. No. 77-1829, May 14, 1979). With these matters firmly in mind, the Court now considers the specific issues raised by plaintiffs.

III.

PHYSICAL ENVIRONMENT[18]

The Biggs Building contains ten permanent wards for patient residence.[19] Space within the building is used for various other purposes, including the visiting room, library, patient canteen, medical and dental clinics and examination rooms, main clothing room, staff conference room, barber shop, offices outside the security gate for

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[18] This discussion concerns only conditions in the Biggs Building. The parties have stipulated that the physical facilities of the Rehabilitation Unit are adequate.

[19] An additional ward is used for temporary patient residence when one of the permanent wards is being renovated.

administrative and medical staff, and offices inside the security gate for social workers, psychologists and other therapists. There are also areas for the vocational education program, the academic education program, music therapy and occupational therapy programs. There is a dining hall with kitchen facilities and an attached recreational building containing an indoor swimming pool,[20] a game room with two bowling alleys, and a gymnasium equipped with movie projector and screen. Each patient ward generally includes a dayroom, nurses' station, clothing room (in which all of the patients' clothing is stored), lavatory containing toilets and sinks, bathroom with showers and/or tubs, and individual sleeping rooms. Seven of the ten permanent wards contain dormitories in addition to the individual sleeping rooms.

There was much testimony, from both plaintiffs' and defendants' experts, concerning the relation between physical setting and effective treatment of mental illness or retardation. Experts from both sides testified that the immediate physical environment can have a definite effect on patients' psychological conditions.[21] There was testimony that drab and depressing surroundings can be harmful or counter-therapeutic as patients may become withdrawn as a reaction to their environment. There was testimony that the patient living areas should be as homelike as possible, as "normalized" as possible; that normalization of the environment enhances treatment. There was evidence of the importance of visual stimulation, by mak-

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[20] There was testimony from a number of witnesses that the swimming pool was not functional at various times during the pendency of this suit.

[21] Testimony of Drs. Frank Rundle and Harris Rubin for plaintiffs, Dr. Robert Schaffer for defendants.

ing the wards as bright, cheerful, and as pleasant as possible, in order to avoid the effects of long-term institutionalization and to enhance patient interest in education and personal development. In addition, experts from both sides testified to the importance of personal privacy. Privacy enhances and may be necessary to the self-respect of each patient; the lack of privacy can be dehumanizing and counter-therapeutic.

In the opinion of this Court, many of the factors, especially the psychological factors, contributing to a "humane" environment for the treatment of mental illness or retardation are uniquely within the expertise of those charged with the operation of the Forensic Unit. The important consideration of providing adequate security for the patients and staff is an additional factor that, in many situations, may override the therapeutic interest in a humane treatment environment. With the advice of experts in the field, this Court could devise its own plan which might improve the environment in the Biggs Building and enhance the treatment function by providing more comfortable surroundings. However such an exercise might benefit the patients' living conditions, that is not the Court's constitutional role. Only those conditions which violate a constitutional prohibition or operate to deny a constitutional right are subject to the examination of a federal court.

Although plaintiffs' experts, as well as defendants' experts, had specific criticisms of the Biggs Building, none was willing to describe the facility generally as "inhumane." This Court has identified certain physical aspects of the Biggs Building that are not minimally adequate to provide the humane treatment environment required by the Constitution and will examine each in turn.

A.

Climate Control

There was overwhelming evidence that a combination of extreme temperature and high humidity in the Biggs Building causes the patient living areas to be almost unlivable during the late spring and summer months.[22] Descriptions of the climate inside the Biggs Building ranged from "extremely warm" and "exceedingly uncomfortable" to "incredibly hot" and "unbearable." A former staff member testified that the heat and humidity caused the patients to become lethargic.[23] There was also evidence that certain parts of the building are very cold in winter, due in part to drafts from sprung windows that are difficult to close.[24] The Court finds that the climatic conditions in the Biggs Building are not minimally adequate to provide a humane treatment environment.[25]

B.

Lavatories and Bathrooms

Each lavatory on the patient wards contains from three to five toilet fixtures and generally a corresponding

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[22] Defendants' experts also assigned the installation of air conditioning a high priority. Testimony of Drs. Hubert Carbone, Robert Schaffer, and Albert Glass.

[23] Testimony of Bonnie McBride.

[24] Testimony of Joseph Mangini, Forensic Unit Director. There was additional testimony that parts of the heating system, now repaired, were broken down for one month during the winter of 1977-78, leaving sections of the building without heat.

[25] Funds have already been appropriated by the Missouri legislature to air condition at least two, and possibly four, wards in the Biggs Building, to be functional by the summer of 1980. No inference should be drawn from the above finding that air conditioning is a constitutional prerequisite for an adequate physical facility. The Court's finding is based upon the unique circumstances of the construction and location of the Biggs Building. Funds also have been appropriated by the legislature to replace all of the windows in the Biggs Building.

number of sinks. The toilets are without seats and are separated by partitions approximately forty inches high. The partial stall thus created does not completely enclose the toilet, and there is no door to screen the toilet while in use. The bathrooms generally contain three to four showers and/or bathtub. There are no curtains or partitions to provide privacy while bathing. The expert testimony offered by both parties was unanimous in condemning the inadequate privacy afforded by the lavatories and bathrooms in the patient wards. The Court finds that the lavatories and bathrooms on the patient wards, at least with respect to patient privacy, are not minimally adequate.[26]

C.

Dormitories

Seven of the ten permanent wards have sleeping dormitories in addition to individual sleeping rooms. The dormitories are divided into "cubicles" usually containing two beds. The beds are located in close proximity to one another. There was testimony by plaintiffs' experts that the sleeping dormitories do not provide adequate privacy for patients.[27] Further, the dormitories were characterized

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[26] Mr. Mangini, the Unit Director, testified that the open toilets and bathing facilities were so designed as a security precaution to allow continual observation of patients by ward staff. Design reflecting security considerations is valid and extremely important. Security will be a key factor at the final remedy stage of this case. The record at this point is not sufficiently developed for the Court to make a final conclusion whether, in the case of lavatories and bathrooms, security needs outweigh the privacy factor. Although Mr. Mangini testified that the lack of privacy was caused by security considerations, he also testified that the capital improvement funds already appropriated by the legislature include money to remodel sixteen lavatories and bathrooms *to achieve improved privacy for patients.*

[27] The former Director of the Missouri Department of Mental Health agreed with this assessment of the Biggs Building dormitories. Deposition of Dr. Duane Hensley.

as "dangerous." Plaintiffs' expert pointed up the possibility of sexual misconduct accompanied by coercion or force, as forceful individuals often are able to control weaker patients.[28] Physical assault, whether sexual or otherwise, might not be readily detectable by staff members because the sleeping dormitories are not covered by the closed circuit television monitoring system. The Court finds that the sleeping dormitories in the Biggs Building, as they are presently constructed, are not minimally adequate with respect to patient privacy and with respect to patient security from assault.[29]

D.

Furnishings and Personal Belongings

The individual sleeping rooms on eight of the ten permanent wards in the Biggs Building are furnished with only a bed. All clothing is kept in the ward clothing room, where each patient is assigned an open bin for folded clothing and a hanger for his shirt, jacket or coat. Other personal belongings are stored in a small locker in the ward dayroom. The individual sleeping rooms are painted in a variety of colors but are devoid of personal effects, books, pictures, decorations, or any indication of individuality. Except for a bed, each room is completely bare, and, in the words of one of defendants' expert witnesses, appears "very stark."[30]

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[28] Testimony of Dr. Harris Rubin.

[29] It should be noted that the above finding does not amount to a *per se* proscription of sleeping dormitories to house involuntarily committed mental patients. The Court's finding is based on the facts of this case, which involves patients who have been committed to the Forensic Unit because of the danger of their violent and aggressive behavior.

Mr. Mangini testified that funds already appropriated by the Missouri legislature include money to convert the sleeping dormitories in the Biggs Building to individual sleeping rooms.

[30] Testimony of Dr. Hubert Carbone.

In marked contrast are the individual sleeping rooms on the remaining two wards.[31] These rooms are similar to those described above in size and design, but are worlds apart in suitability for human living. Each room is furnished with a bed, table or desk, chair, and perhaps bookshelves. Individual decoration is the most striking distinction. Patients display photographs, posters, pictures, and small rugs. The desk or table is used to store books and writing materials and to store and display other personal possessions. These rooms exhibit diverse personalities and appear relatively habitable; they are not bare, drab, or stark.

Plaintiffs' experts testified that the "amenities of civilized living" are necessary to a humane treatment environment. This requires, say the experts, furnishing individual sleeping rooms with at least a bed, a table or desk, and a chair.[32] The testimony of defendants' experts who spoke to the subject is in accord as to the importance of the mental patient's immediate environment and the provision of furniture.[33]

At first glance, the matter of furniture appears to be one area in which the Court has no place substituting its judgment for that of defendants. *See Bell* v. *Wolfish*, 47 U.S.L.W. at 4518. However, the testimony and photographic exhibits presented at trial firmly convince this

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[31] These wards house patients in the criminal sexual psychopath and personality disorder categories, as well as patients of all diagnoses who have been approved for transfer to the Rehabilitation Unit because they are no longer in need of confinement in a maximum security setting. A reasonable inference is that such patients present a comparatively lower risk of unpredictable outbursts of violent behavior.

[32] Testimony of Drs. Frank Rundle and Frank Gilner.

[33] Testimony of Drs. Hubert Carbone and Robert Schaffer.

Court that, in a treatment context, the issue rises to a constitutional level. Substance is added to the definition of "human environment" by testimony on the importance to effective treatment of "normal" surroundings, of visual stimulation, and of privacy, which certainly includes the opportunity to keep and use one's own personal belongings.[34] The bare rooms and restrictive storage arrangements on the eight described wards do not provide a humane treatment environment.[35] The Court finds that the individual sleeping rooms on Wards 1, 2, 3, 4, 5, 6, 7, 8 and 9 are not minimally adequate in the respects discussed above.

The furnishing of patient rooms and allowing possession of personal belongings or clothing is an area with serious implications regarding security. The most innocuous furnishing might become a dangerous weapon in the hands of a disturbed patient acting out in an aggressive or suicidal manner. The record in this case is not sufficiently developed to permit a comprehensive solution to the prob-

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[34] *See* Missouri Department of Mental Health Operating Regulation No. 148 (Jan. 20, 1975):

> Each patient or resident in a Missouri Department of Mental Health facility has the following rights:
>
> . . .
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> 11. To keep and display personal belongings unless your physician says no and writes the medical reason in your record; . . .

[35] *See* Davis v. Watkins, 384 F. Supp. 1196, 1210 (N.D. Ohio 1974) (Court ordered that patients similar to the population of the Forsenic Unit be furnished a bed, a closet or locker, and appropriate furniture such as a chair, bedside table, mirror, rugs, and bookshelves, unless contraindicated by professional staff who shall state the reason in writing); Wyatt v Stickney, 344 F. Supp. 373, 381 (M.D. Ala. 1972) (bed, closet or locker for personal belongings, chair, and beside table), *aff'd sub nom.* Wyatt v. Aderholt, 53 F. Supp. 454, 460 (W.D. Mo. 1978) (general population cells at the Missouri State Penitentiary are furnished with a bed, table, chair, and locker).

lem.[36] However, an individualized approach has been suggested in which treatment staff could withhold individual furnishings from a patient deemed to be a present security risk. For the protection of the patient, a written order with medical reasons stated thereon might be required, which order could be renewed periodically upon subsequent assessment of the patient's condition.

IV.

STAFF

Plaintiffs contend that there are inadequate numbers of qualified staff in the Forensic Unit to provide minimally adequate treatment. This argument has been directed generally at an alleged inadequacy in numbers of staff, rather than at their qualifications or competency as a group. Experts from both sides of the case testified that the Forensic Unit staff is generally well qualified, competent, hard-working, and dedicated. At trial, plaintiffs offered extensive expert testimony regarding the numbers of staff necessary to carry on the Forensic Unit treatment programs.[37] Plaintiffs' experts provided the Court with comprehensive recommendations regarding the overall staffing of the Forensic Unit [38] and with staffing recommenda-

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[36] Dr. Robert Schaffer, as expert for defendants, testified that furnishings such as curtains, tables, chairs or lamps could be a *potential* security problem.

[37] Patients are assigned to one of six treatment programs depending on diagnosis: Program 1, chronic schizophrenics; Program 2, criminal sexual psychopaths, personality disorder, and pretransfer patients; Program 3, mentally retarded and brain damaged patients; Program 4, maximum security patients, new admissions, and acute schizophrenics; Program 5, patients being evaluated prior to trial; Program 6, Rehabilitation Unit. A team of treatment staff is assigned to each program.

[38] Dr. Frank Rundle testified that an optimal staffing level for a facility such as the Forensic Unit would yield a treatment staff/patient ratio of 0.486:1 and a total staff/patient ratio of 2.1:1. Dr. Rundle stated

(Continued on next page)

tions for each specific treatment program. Several members of the Forensic Unit treatment staff also testified, each giving his or her view of the current staff situation and the needs of each treatment program for additional staff. Unit and Hospital administrators testified of the general sufficiency of the present staf, each adding, however, that more staff would be of great use in every program.[39] Testimony of defendants' experts characterized Unit staffing levels as generally sufficient to provide minimally adequate treatment, with a caveat as to perceive deficiencies in one or another specific area.[40]

This record has been examined with great care. The Court is impressed that the staff of the Forensic Unit per-

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Footnote continued

that absolute minimal staffing ratios would be 0.475:1 for treatment staff and 1.75-1.95:1 for total staff. Dr. Rundle's specific staffing recommendations, however, yield staff/patient ratios somewhat lower than that: Biggs Building: treatment staff/patients, 0.35:1, total staff/patients, 1.2:1; Rehabilitation Unit: treatment staff/patients, 0.3.1:1, total staff/patients, 1.0:1.

Dr. Terry Brelje testified that the type of patient confined in the Forensic Unit required a total staff/patient ratio of 1.5:1, but that the minimally adequate staffing level would probably yield a total staff/patient ratio of below 1.5:1.

[39] Dr. Hugh Shallenberger, Assistant Superintendent for Treatment of Fulton State Hospital, testified that the staffing level in the Forensic Unit is "marginal," enough to do the job but not plentiful. Dr. James Rittenbusch, Superintendent, included 39 additional personnel in the budget request for Fulton State Hospital for fiscal year 1979-1980. He testified that the additional personnel were not absolutely necessary to implement treatment plans but would relieve a "hardship" in staffing levels. Dr. Ritterbusch testified that, in his opinion, the Forensic Unit was short 2 psychiatrists, 5-6 social workers, 3-4 psychologists, and 5-6 clerical staff.

[40] Dr. Jonas Rappeport testified that staffing levels were minimally adequate, but that an additional psychiatrist was needed to supervise treatment in the Rehabilitation Unit. Dr. Hubert Carbone testified that the numbers of the staff were minimally adequate, but that there was a need for more treatment staff to be assigned to Program 4, as well as a need for more registered nurses.

forms a difficult task, often with much less than optimal resources. It is an unfortunate fact that the treatment programs established in the Forensic Unit, through no fault of the limited personnel, often do not equal the high professional standards of either the expert witnesses or of the Forensic Unit staff itself. Provision of additional resources to insure a greater opportunity or effective treatment of the mentally ill and retarded patients confined in the Forensic Unit is highly desirable and would be the act of an enlightened legislature. That constitutional role does not fall to this Court.

In *Wyatt* v. *Stickney*, 344 F. Supp. at 375, the staff of an Alabama general psychiatric hospital was held to be constitutionally inadequate. The court found that "most staff members were poorly trained and that staffing ratios were so inadequate as to render the administration of effective treatment impossible." The record is clear that that description does not apply to the staff of the Forensic Unit. It is also clear that the staff/patient ratios of the Forensic Unit fall below, some may say significantly below, the recommendations of plaintiffs' experts.[41] Such standards and recommendations are instructive and useful in determining constitutional minima, but they are not dispositive. Although this Court is convinced that there is much room for needed improvement in the staffing levels of the Forensic Unit, it is unable to find that the present level of staffing works a *constitutional* deprivation. Ac-

[41] In the Biggs Building, the ratio of treatment staff to patients is 0.187:1 and the total staff/patient ratio is 1.00:1. The Rehabilitation Unit treatment staff/patient ratio is 0.228:1 and the total staff/patient ratio is 0.777:1. Combined ratios for the entire Forensic Unit are treatment staff/patients, 0.198:1; total staff/patients, 0.998:1. In calculating these ratios, patients in the Forensic Unit for pretrial psychiatric evaluation and staff directly attributable to such patients were excluded.

cordingly, the Court finds that the staff of the Forensic Unit is minimally adequate.[42]

V.

INDIVIDUAL TREATMENT PLANS

The third essential element of minimally adequate treatment is an individualized treatment plan for each patient. Such a plan is not only a treatment tool necessary for the coordination of treatment efforts by many staff members, but also functions as a device to insure that each patient is treated as an individual and is not overlooked or forgotten among the many patients in a large state mental hospital.

The Missouri Department of Mental Health adopted a policy requiring the use of individualized treatment plans

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[42] Plaintiffs object to the administration of medication by trained psychiatric aides, *i.e.*, by anyone not qualified as at least a licensed practical nurse. Psychiatric aides who administer medication in the Forensic Unit must pass a medication course which exceeds the minimum standard of the State Board of Education of the Missouri Division of Mental Health and are subject to review every two years. There was evidence of a January 6, 1978, report revealing medication discrepancies and errors by psychiatric aides in the Forensic Unit. Testimony of Belinda Heimericks. One cause of such errors was identified as insufficient nurses to properly supervise medication aides. Ms. Heimericks also testified that the number of nurses on the staff had increased since her report and that she thought the situation had improved, but did not specifically know that it had.

The use of trained psychiatric aides to administer medication is common in state hospitals due to a shortage of professional nursing staff. Testimony of Dr. Jonas Rappeport. If more resources in the form of professional nursing personnel were made available to state mental hospitals, it is likely that the quality of nursing care, including the administration of medication, would improve greatly. However, the Court is unable to find that defendants' policy or practice of using trained psychiatric aides to administer medication involves a *constitutional* deprivation.

in 1975.[43] Dr. Hugh Shallenberger, Assistant Superintendent of Fulton State Hospital, testified that no specific training in preparing the new type of plan was provided in 1975, and that as a result the early plans were poorly written and probably not useful treatment tools. Under a grant from the National Institute of Mental Health, the hospital administration brought in a consultant to train core staff members in preparing and using the plans, who would in turn train the remainder of the staff. Training was begun in March, 1978, and continues presently. Dr. Shallenberger testified that complete training may take three years and that the consultant will be returning in the future to reassess the treatment plan program. Plaintiffs' experts reviewed the treatment plans of patients in the Forensic Unit in 1976, 1978, and immediately prior to trial. Their testimony was that the plans were substantially inadequate in 1976. The record indicates, however, that by 1979 the overall quality of the plans showed a marked improvement, even though the plans were, in the opinions of plaintiffs' experts, still inadequate. Specific criticism of the present treatment plans was directed at the delay between admission and preparation of the initial treatment plan and at the length of time before each plan is reviewed. There was also testimony that some plans are incomplete and written in too general terms to be of real value. A former Forensic Unit staff member testified that the initial treatment plan was usually prepared after the patient had "staffing" by treatment team members

[43] Missouri Department of Mental Health Operating Regulation No. 149 (Jan. 20, 1975) requires that a written individualized treatment plan be prepared for each patient not later than 5 days after admission. The plan is to contain the reason for hospitalization, patient problems, treatment, measure for treatment effectiveness, time for measurement, staff responsibilities, length of time before review is to be done, least restrictive environment, therapeutic work assignment, if any, and wages to be paid.

ninety days after admission, although hospital policy required preparation of the initial plan earlier than that. She also testified that review of the plans took place when staff members could find the time to do it, not on any regular basis, but generally more frequently than once every two months.[44] There was testimony from staff members that, as of the date of trial, treatment plans had not been prepared for significant numbers of patients.[45] Recent admissions accounted for only part of those patients without treatment plans.

Although it is apparent that room exists for improvement in the quality of the individualized treatment plans, the Court finds that the plans in existence are minimally adequate.[46] However, the Court further finds that the long delay in preparation of the initial treatment plan after admission and the lack, in practice, of regular review of the plans based on a reasonable review period operate to deny each patient a minimally adequate treatment plan.

VI.

LEAST RESTRICTIVE ENVIRONMENT

When a patient's treatment team finds that his condition no longer requires confinement for treatment in a maximum security setting, the team makes a recommendation that the patient be transferred from the Biggs Building to the less restrictive environment of the Rehabilitation Unit. Upon that recommendation, the patient is moved to the Biggs Building pretransfer ward, Ward B-11. Before he is actually transferred to the Rehabilitation Unit from Ward B-11, the patient must have a staffing attended

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[44] Testimony of Bonnie McBride.

[45] Testimony of Bonnie McBride and David Jannick.

[46] Patients for whom no plan has been prepared are, of course, being denied a minimally adequate individualized treatment plan.

by the hospital Superintendent, Dr. Ritterbusch, who must give his approval to the transfer.[47] The evidence shows that after a patient is placed on the pretransfer ward, he must wait from two to four weeks to as long as two months for the required staffing. There is a further wait for a vacancy in the Rehabilitation Unit ever after Dr. Ritterbusch approves the transfer, from as little as two weeks to as long as four to six months. In practice, this procedure can result in a patient waiting in the Biggs Building pretransfer ward for up to eight months (although a wait that long would be somewhat rare) *after* his clinical treatment team found that his condition no longer required that he be confined for treatment in a maximum security unit. Defendants admit that this result is caused by a lack of sufficient less restrictive facilities, either in the Forensic Unit or elsewhere.[48]

Such confinement is not consistent with due process. Patients are placed in the maximum security section of the Forensic Unit (the Biggs Building) because of their dangerousness. After the treatment staff has determined that that aspect of a patient's behavior is no longer present, there is no constitutional justification for the continued "massive curtailment of liberty" inherent in confinement in the Biggs Building. In Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969), the District of Columbia Circuit held that a requirement of the least restrictive alternative was implicit in a District of Columbia commitment statute and stated:

> The new legislation apart, however, the principle of the least restrictive alternative consistent with the le-

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[47] There was evidence that patients with no history of violent behavior can be transferred to the Rehabilitation Unit without being staffed by Dr. Ritterbusch.

[48] Testimony of Joseph Mangini, Forensic Unit Director.

> gitimate purposes of commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty . . . .

See Eubansk v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976); *Davis* v. *Watkins, supra; Welsch* v. *Likins, supra.*

Plaintiffs suggest that the appropriate remedy for this constitutional violation is an order requiring the immediate transfer of those patients who have been approved for transfer from the Biggs Building to the Rehabilitation Unit. Although urgency of remedy is a very important consideration in this matter, the Court is not able to adopt planitiffs' suggested remedy. Dr. Ritterbusch testified that the Rehabilitation Unit is operating at its patient capacity, even though there are some vacant beds. There is a real danger that the immediate transfer of all patients on the transfer waiting list would cause over-crowding in the Rehabilitation Unit, disrupt on-going treatment, and create a serious security problem. This Court will not impose a remedy that may result in substantial harm to those seeking relief. However, the problem of the transfer waiting list requires priority attention from defendants and an expedited solution.

VII.

VISITATION, TELEPHONE AND MAIL

Visiting hours in the Biggs Building are from 1:00 p.m. to 2:40 p.m. every afternoon. On weekends and holidays a morning visiting period from 9:00 a.m. to 10:45 a.m. is also permitted. Visits may last the entire visiting period unless the visiting room is crowded, in which case visits

may be restricted to thirty minutes.[49] No person under the age of fifteen is permitted in the Biggs Building visiting room. Patients may be visited by their children under fifteen by special arrangement. These visits take place in a separate room and are limited to fifteen or twenty minutes. In the visiting room, patients visit across a table; no personal contact such as touching or holding hands is permitted.

The visiting policy in the Rehabilitation Unit is more liberal, with visiting hours of 9:00 a.m. to 11:00 a.m., 1:00 to 4:00 p.m., and 7:00 to 8:00 daily. No ex-patients or employees may visit patients without the prior approval of the treatment staff. Children under fourteen may not visit on the wards of the Rehabilitation Unit; families with children must visit in the canteen.[50]

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[49] The visiting regulations permit a patient to be visited at one time by any number of visitors; however, the visiting room has a capacity for only 15 visitors (30 seats). The visiting room measures 49'6" by 14'9" (730 square feet). Mr. Mangini testified that patients are aware of an exception in the visiting rules for visits by young children in rooms other than the Biggs visiting room. This testimony is corroborated by information provided patients in Biggs Unit Handbook for Residents at 45: "a special visit may be arranged through your social worker or doctor." However, the visiting policy does not mention the exception: "No persons under fifteen (15) years of age will be permitted to visit in the Biggs visiting room." The record is unclear whether patient's families are sufficiently informed of the exception to make it a real alternative. The Court's comments on the short duration of regular visiting hours apply with greater weight to the 15-20 minutes time a patient is permitted to visit with his young children.

[50] Plaintiffs contend that this policy operates as an effective bar to visits by the young children of patients on Wards 2-South and 3-South (the locked wards) because these patients "are normally not allowed off the ward." Plaintiffs' Post-Trial Brief at 7 n.16. The record does not reveal whether patients on those wards are allowed to leave the ward for a visit with their young children. If patients were not allowed visits with their children, such a policy would be subject to a more severe criticism than the Biggs Building policy toward visits by young children.

Patients in the Biggs Building may receive incoming telephone calls from their attorneys only if such a call is arranged and approved in advance. Patients may receive no other incoming *calls*.[51] A patient may place an outgoing call only if request is made and approval received from the treatment staff. Approval is given only in case of an "emergency" (*e.g.*, death or serious illness in the patient's family) or "when it is determined to be beneficial to the patient."[52] Patients may place collect calls to their attorneys only prior to a ninety day staffing, before a court appearance, or prior to "other legal technicalities regarding their case."[53]

Rehabilitation Unit patients have access to pay telephones in the main Administration Building which may be used during patients' pass time.[54] At other times, they may call their lawyers at any time and may place collect calls to their families once a week. Rehabilitation Unit patients apparently may receive incoming calls, provided callers identify themselves, except that no calls may be received from ex-patients or employees without approval from the treatment staff.

All outgoing mail from patients in both the Biggs Building and the Rehabilitation Unit may be sealed by the patients and is not screened by Forensic Unit staff in any

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[51] Missouri Department of Mental Health Operating Regulation No. 148 (Jan. 20, 1975) states that patients have a right "to be given writing materials and *reasonable use of a telephone* if [they] have no money." (emphasis added).

[52] Unit Policy for Use of Telephone by Biggs Patients.

[53] *Id.*

[54] Plaintiffs claim that patients in Rehabilitation Unit Wards 2-South and 3-South are not allowed such access to pay telephones, as they "are normally not allowed off the ward." Plaintiffs' Post-Trial Brief at 8 n.18. There is simply no evidence in the record to prove or disprove that contention.

way.[55] Postage for two free letters per week is provided to each patient. Incoming mail to patients in the Biggs Building and the two locked wards of the Rehabilitation Unit is opened and checked for contraband before it is delivered to the patients. Correspondence is not read by hospital staff. The screening for contraband is done in an administration office, outside the presence of the patient-addressee, except for attorney or court-related mail which is opened and screened for contraband in the presence of the addressee.

Plaintiffs challenge certain aspects of the visitation, telephone, and mail policies on the ground that they are unduly restrictive, in many instances counter-therapeutic, and violative of the patients' constitutional rights. As discussed above, this type of institutional regulation is particularly within the province of the Forensic Unit administration, and it is not the constitutional role of the Court to substitute its judgment for that of the state officials responsible for the Forensic Unit, absent a *constitutional* violation. Defendants argue that none exist.[56]

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[55] Prior to September, 1977, all incoming mail was opened and checked for contraband outside the presence of the patient-addressee. All outgoing mail, except that addressed to "any official, lawyers, etc.," was read by hospital staff and subject to censorship. Plaintiffs suggest that the Court rule on defendants' *pre-existing* mail policy and rely on language in United States v. W.T. Grant Company, 345 U.S. 629 (1953), to the effect that the voluntary cessation of illegal conduct does not render an issue moot. The Court declines to so rule. In *W.T. Grant* the Supreme Court also stated that there must exist "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." There is nothing in this record to indicate *any* likelihood that defendants will revert to the old mail policy and this Court is satisfied that no relief is needed with respect to the old policy. *Id.* at 633.

[56] Defendants' position is that plaintiffs claims regarding the mail and telephone policies simply do not present constitutional questions. Defendants cite White v. Keller, 438 F. Supp. 110 (D.Md. 1977),

(Continued on next page)

Plaintiffs were committed to the Forensic Unit to receive treatment in a maximum security setting. Like the pretrial detainees in Bell v. Wolfish, 47 U.S.L.W. 4507 (U.S. May 14, 1979), plaintiffs may be legitimately confined and subjected to conditions and restrictions inherent in such confinement, as long as those restrictions do not amount to punishment or are otherwise violative of the Constitution. The restrictions challenged by plaintiffs must be analyzed in terms of the legitimate policies and goals of the Forensic Unit. Pell v. Procunier, 417 U.S. 817 (1974). If restrictions imposed by confinement in the Forensic Unit are not reasonably related to a legitimate government objective, or if such restrictions are excessive in relation to that objective, the resulting deprivation of liberty amounts to punishment and a denial of due process. *Bell* v. *Wolfish, supra.*

Defendants justify the restrictions of the Biggs Building visiting policy as necessary security procedures. Although no such justification is urged for the Biggs Building telephone policy, the record reveals that security concerns also may be inherent in telephone use or abuse by patients.[57] Defendants' legitimate interest in the efficient administration of the Forensic Unit also would justify limits and restrictions placed on visiting hours and telephone use to insure that facilities are used in an orderly manner and that neither visitation nor telephone use by patients interferes with the normal operations of the Forensic Unit. However, the restrictions imposed on patients by the Biggs Building visitation and telephone policies are so extreme as to be not reasonably related to legitimate

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Footnote continued
aff'd, 588 F.2d 913 (4th Cir. 1977), and other cases concerning prison and jail visitation policies and state that there is no federal constitutional right to prison visitation, either for prisoners or visitors.

[57] Testimony of Dr. Terry Brelje.

interests in either security or orderly hospital administration. The patient confined in the Biggs Building is effectively precluded from using the telephone; he may not receive calls from relatives, friends, his wife, or children. In the absence of an "emergency," he may not make calls out of the building. The combination of short visiting hours (one hour and forty minutes) and the completely inadequate capacity of the visiting room (where visits are restricted to one-half hour if the room is crowded) discourage long and comfortable visitation. These severe restrictions isolate patients from the outside world and constitute an excessive and arbitrary response to a legitimate interest in institutional securty. Additionally, these policies are completely at odds with the therapeutic objective of the Forensic Unit. Visitation and telephone contacts are important to maintain ties in the community outside the mental hospital. To impose so complete a limitation on outside contact deprives patients of needed support from family, friends and other resources in the community. The result of isolation from the outside world can be counter-therapeutic and actually harmful.[58] The Court finds that the visitation and telephone policies of

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[58] Testimony of Drs. Frank Gilner, Harris Rubin, and Terry Brelje. The Court must note that, although it is a maximum security facility housing patients dangerous to themselves or to others, the Forensic Unit is a mental hospital and not a prison. Even though the valid government interest in institutional security may at times override all others, the pre-eminent objective of the Forensic Unit is treatment and rehabilitation. There may be patients whose conditions would justify greater or more particular limitations on visitation or telephone use consistent with defendants' important interest in institutional security. An order of limitation written in such patients' treatment plans would constitute an individualized approach. Regarding visitation and telephone rights at mental hospitals, see Gary W. v. Louisiana, 437 F. Supp. 1209, 1228 (E.D. La. 1976); Davis v. Watkins, 384 F. Supp. 1196, 1207-08 (N.D. Ohio 1974) (forensic patients); Wyatt v. Stickney, 344 F. Supp. 373, 379 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

the Biggs Building are so restrictive as to constitute punishment and are therefore violative of patients' rights under the due process clause of the fourteenth amendment. The Court further finds the restrictions imposed by the visitation and telephone policies of the Rehabilitation Unit to be not so severe, and that such policies fall within defendants broad discretion to define institutional regulations.

The Court must disagree with plaintiffs' argument that they have an unrestricted right to receive sealed legal mail. Defendants' policy of opening legal mail in the presence of the addressee to inspect for contraband (without reading the correspondence) is reasonably related to the substantial government interest in maintaining the security of the Forensic Unit to protect both patients and staff. Wolff v. McDonnell, 418 U.S. 539, 477 (1974). The Court also must disagree with plaintiffs' contention that incoming nonlegal mail may be opened to inspect for contraband *only* in the presence of the addressee. Defendants' decision to screen nonlegal mail for contraband (correspondence is not read) at a central location, before the mail is brought onto the wards, is within the realm of administrative judgments to which the Court must defer.[59]

VIII.

SECLUSION AND RESTRAINT

A.

Medication

Plaintiffs' contention that there is excessive use of

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[59] *Contra,* Davis v. Balson, 461 F. Supp. 842 (N.D. Ohio 1978) (the presence of the patient is the only way he can know his mail is not read). *See* Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972) (patients have a right to receive sealed general mail unless the treatment staff imposes a special restriction by written order), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

medication to control patient behavior, a form of "chemical restraint," is not supported by the record. Expert witnesses from both sides testified that observation of patients and examination of records indicated that Forensic Unit patients are not overmedicated.[60]

B.

Seclusion and Physical Restraint

Seclusion is a means of restricting a patient by removing him from social contact and placing him in a locked room. Seclusion in the Forensic Unit involves placing the patient in one of the individual sleeping rooms on the ward, usually furnished with only a bed, and locking the door. During seclusion, the patient is not permitted to wear his clothing, excepting underwear. Restraint is a means of restricting a patient's ability to react physically by temporarily limiting his freedom of body and limb movement by use of physical or mechanical restraints, such as cuffs, straps, mittens or braces.

There was a consensus of expert testimony that the occasional use of seclusion and physical restraints is a necessary and useful treatment device in mental hospitals, especially with the type of dangerous patient housed in the Forensic Unit. However, a *medical* decision to physically restrain or isolate a mental patient involves no less an extraordinary deprivation of liberty than does the use of punitive isolation in a prison. Negron v. Preiser, 382 F. Supp. 535 (S.D.N.Y. 1974). "A protected interest is no less infringed by government action taken for reasons which purport to serve [a] . . . rehabilitative purpose

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[60] Testimony of Drs. Frank Rundle, Jonas Rappeport, and Hubert Carbone. Dr. Allen Barkley testified to the contrary, that it was his experience that mentally retarded patients often were put on medication for the sole purpose of controlling behavior problems.

than by government action taken for disciplinary reasons." Davis v. Balson, 461 F. Supp. 842, 876 (N.D. Ohio 1978). In prison, an inmate's fourteenth amendment rights regarding the imposition of punishment, including isolation, are protected by the due process hearing requirements in Wolff v. McDonnell, 418 U.S. 539 (1974). The mental patient has no less *right* to due process regarding the imposition of the very conditions (seclusion or isolation) which would require a due process hearing in a prison context.

As stated above, the range of discretion of state officials is greatest in decisions involving medical judgments. *Negron* v. *Preiser, supra.* Moreover, the procedures required to insure due process vary with the nature of the governmental function involved, as well as the private interest affected. *Wolff* v. *McDonnell, supra.* A requirement of advance notice and hearing is not at all appropriate to the medical decision to use seclusion or restraints. Such a decision often is made under conditions of emergency, in which an agitated patient presents an immediate danger to himself or others. However, this Court concludes that minimal due process requires at least that the *medical* decision to utilize physical restraints or seclusion be made in a context designed to protect the patient from an arbitrary deprivation of personal liberty. *Negron* v. *Preiser, supra;* Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).[61]

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[61] In theory, this formal decision by a highly educated professional, that the symptom or condition exists, that this treatment is indicated and is not disproportionate to the "symptom," and that the treatment will not continue beyond the time it is indicated, accomplishes the function of protecting the patient from an arbitrary deprivation of a right or privilege which in a prison is accomplished by a form of due process hearing.

(Continued on next page)

Defendants' *policy* regarding seclusion and restraints recognizes the important liberty interests at stake and provides a procedure to guard against arbitrary deprivation.[62] All seclusion or restraint orders must be signed by a doctor. Seclusion or restraint is to be used to protect the patient and others from his severe emotional outbursts, perhaps involving acts of aggression or of self-abuse. All other means of controlling the patient are to be tried before seclusion is used. A patient may be put in seclusion or restraints in an emergency by psychiatric aides. However, as soon as the emergency is under control, the doctor must be notified. Emergency use of seclusion or restraints may be no longer than twenty minutes. Within that time the doctor must see the patient and order continuation of the seclusion or restraint, if indicated. Written seclusion and restraint orders are effective for no more than twenty-four hours and must be renewed if seclusion or restraint is to be continued. A patient must be seen by aides every fifteen minutes and his condition charted every hour. Each incident of seclusion or restraint is to be reported in a manner to facilitate review of the doctor's decision. The reporting is to include how the seclusion or restraint is to be used, a description of the behavior that required such use, alternatives which were attempted or considered prior to the use of seclusion, and the duration of the order. All such incidents are to be reviewed

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Footnote continued

Negron v. Preiser, 382 F. Supp. 535, 542 (S.D.N.Y. 1974).

In Davis v. Balson, 461 F. Supp. 842, 877 (N.D. Ohio 1978), the court rejected defendants' attempt to distinguish between deprivations for disciplinary reasons and those made for treatment or therapeutic reasons. The court found as a fact that the deprivations at issue in that case were disciplinary in nature.

[62] Missouri Department of Mental Health Operating Regulation No. 133 (Revised June 10, 1978); Fulton State Hospital Regulation No. 1100.09 (Rev. 4/74).

by the treatment team and a separate review committee. The treatment program coordinators receive daily reports of the use of seclusion and restraints in the program.

Plaintiffs take issue, not with defendants' general policy regarding seclusion and restraints described above, but with the *practices* in the Forensic Unit. Based on their examination of patient records, plaintiffs' experts testified that the twenty minute limit on emergency seclusion is not observed; that there is often no indication that a secluded patient was seen by a doctor; that the time a seclusion began is often not in the record; that seclusion orders are signed without a doctor's examination; that insufficiently qualified staff, such as licensed practical nurses, are able to write seclusion orders; and, perhaps most importantly, that the records often do not indicate the *reasons* for seclusion, or are stated in such broad and vague terms that after-the-fact review of a decision to seclude is impossible.[63] A former Forensic Unit staff member testified that although, in her opinion, seclusion and restraints are used in a generally appropriate manner in the Forensic Unit, there were incidents when seclusion orders would be signed without an examination by the patient by the doctor. She also testified that a patient is generally seen by a doctor within one half-hour of an emergency seclusion.[64]

The Court concludes that the safeguards of defendants' policies regarding *medical* decisions to use seclusion or restraints are not adequately carried into practice to afford Forensic Unit patients minimal due process. This conclusion is based primarily on the lack of documentation of patient behavior leading to use of seclusion or

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[63] Testimony of Drs. Frank Rundle and Terry Brelje.

[64] Testimony of Bonnie McBride.

restraints and of the reason to justify each incident of seclusion or restraints.[65]

Plaintiffs also argue that seclusion may not be used for disciplinary purposes. Although defendants' policy forbids the use of restraints and seclusion for punishment,[66] the record is clear that seclusion is used as a form of institutional discipline.[67] The Forensic Unit Director testified that seclusion is used if a patient presents a danger to himself or others *as well as* for infraction of ward rules.[68] Although plaintiffs' experts offered extensive testimony that seclusion is not an appropriate form of discipline in mental hospitals, the Court is not able to conclude that use of seclusion for disciplinary reasons is unconstitutional. Considering the type of patient confined in the Forensic Unit, it is clear that defendants are constantly presented with serious problems of security and the maintenance of orderly living conditions. Defendants could conclude that seclusion is a form of discipline necessary to sustain institutional rules.

However, if defendants use seclusion as a form of *discipline* for the violation of institutional rules, in contrast to a *medical* decision to seclude for some *therapeutic*

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[65] This Court has no desire to restrict treatment decisions or interfere with the maintenance of security in the Forensic Unit. It is apparent to the Court that compliance by defendants with certain aspects of their own seclusion and restraints policy would remedy this deficiency.

[66] Missouri Department of Mental Health Operating Regulation No. 133 (Revised June 10, 1978).

[67] Reasons for seclusion contained in patient records include: automatic seclusion for fighting (first incident–24 hour seclusion, second incident–48 hour seclusion, third incident–transfer to maximum security ward), mouthing off, walking off ward, disobeying, smart remarks, cursing, refusing to mop up spilled coffee, talking loud and smart aleck, and passing cigarettes to other patients in seclusion.

[68] Testimony of Joseph Mangini.

purpose,[69] at the least they must comply with the minimal due process requirements in Wolff v. McDonnell, 418 U.S. 539 (1974). These include (1) written notice of the violation in advance of hearing, (2) a written statement by the fact finder of evidence relied upon and reasons for the disciplinary action, and (3) the opportunity to call witnesses and present other evidence in defense, when such opportunity will not be unduly hazardous to institutional safety. As it is clear that no such procedure is available to a patient before he is secluded for disciplinary purposes, the Court concludes that defendants' use of seclusion for discipline violates patients' due process rights.

For purposes of discussing the appropriate remedy, a conference of counsel will be ordered. At such conference, defendants will be required to submit to the Court a plan which will correct, with reasonable dispatch, the constitutional deficiencies noted in this Opinion. No order will issue at this time. Jurisdiction is retained.

ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE

[69] *E.g.*, when a patient's violent behavior presents an immediate danger to himself or others.

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

PLAINTIFFS' REQUEST FOR AN AWARD OF REASONABLE ATTORNEYS' FEES, EXPENSES, AND COSTS

Plaintiffs move herein for an award of attorneys' fees and expenses pursuant to the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988, as amended.

Plaintiffs also request that pursuant to 28 U.S.C. §1920 all costs be taxed against the defendants.

In support of these requests plaintiffs have submitted their affidavits and appendices. Further grounds are also contained in our accompanying Memorandum.

WHEREFORE, plaintiffs pray this Court to award them reasonable attorneys' fees, expenses and costs as requested herein.

SIGNATURES OMITTED IN PRINTING

CERTIFICATE OMITTED IN PRINTING

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

AFFIDAVIT OF STUART R. BERKOWITZ IN SUPPORT OF PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES, EXPENSES AND COSTS

I, Stuart R. Berkowitz, first being duly sworn, depose and state as follows:

1. I am one of the attorneys for the plaintiffs in the above-entitled case. I make this Affidavit in support of plaintiffs' request for an award of attorneys' fee pursuant to the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. §1988.

2. I received by J.D. degree from Washington University School of Law in June, 1973. Upon graduation from law school I was employed as a staff attorney with the Land Of Lincoln Legal Assistance Foundation in East St. Louis, Illinois, where I specialized in Federal litigation. Since September, 1975, I have been employed by Legal Services of Eastern Missouri, Inc. Since January, 1977, I have been a Senior Staff Attorney and a member of the Health, Education and Employment Unit. During 1976-1977 I was an instructor in legal writing at St. Louis University School of Law.

3. I have been a member of the Missouri Bar since September, 1973, and of the Illinois Bar since April, 1974. I have been admitted to practice before the United States Supreme Court, United States Court of Appeals for the Seventh Circuit, United States Court of Appeals for the Eighth Circuit, United States District Court for the Eastern District of Illinois, United States District Court of the Southern District of Illinois, and the United States District Court for the Eastern District of Missouri.

4. I have had extensive Federal litigation experience in a variety of civil rights cases, See e.g., *Udina* v. *Walsh*, 440 F.Supp. 1151 (E.D.Mo., 1977); *Graves v. Meystrick*, 425 F.Supp. 40 (E.D.Mo., 1977), *aff'd*, 431 U.S. 910 (1978); *Mikel v. Reser*, 440 F.Supp. 1226 (E.D.Mo., 1977); *Nevills v. Illinois*, 388 F.Supp. 622 (E.D.Ill., 1974); *Tenny v. U.S.*, 441 F.Supp. 224 (E.D.Mo., 1977); *Washington v. Walker*, 529 F.2d 1062 (7th Cir., 1976), 75 F.R.D. 650 (S.D.Ill., 1977); *Coppotelli v. Howlett*, 76 F.R.D. 20 (E.D.Ill., 1977); *Garmi v. Metropolitan Sewer District*, 471 F.Supp. 119 (E.D.Mo., 1979).

5. I have also litigated a variety of complex civil rights cases before this Court. See e.g., *Turner* v. *Walsh*, 435 F.Supp. 707 (W.D. Mo., 1977) *aff'd*, 574 F.2d 456 (8th Cir., 1978); *Lambus v. Walsh*, 448 F.Supp. 240 (W.D.Mo., 1977); *Sherrill v. Freeman*, 473 F.Supp. 1260 (W.D. 1979).

6. In Appendix A attached to this Affidavit I have set forth a list of the hours I have spent working on this case. The Appendix was typed from a daily time sheet I maintained in connection with this case. No time has been included for any work performed by legal assistants.

7. In Appendix B attached to this Affidavit I have set forth a statement of all out-of-pocket expenses and costs incurred in connection with this case. The statement is

based upon a review of records and files and is supported by documentation maintained at LSEM.

I have read the above and attached Appendices A and B and they are true and accurate to the best of my knowledge, information and belief.

SIGNATURES OMITTED IN PRINTING

APPENDIX A

ECKERHART V. HENSLEY

Time Sheet

Stuart R. Berkowitz

Date	*Activity*	*Time*
1-19-78	Preliminary review of file and conference with Bill Hyde	2.5
1-20-78	Drafting and review of appearance	.5
1-25-78	Review of pleadings file	2.5
1-30-78	Review of pleadings file	3.0
1-31-78	Review of pleadings file	1.5
2-1-78	Meeting with Boicourt in Jefferson City regarding exhibits	11.0
2-14-78	Review of depositions	2.5
2-15-78	Review of depositions	2.0
2-22-79	Review of depositions	3.0
2-23-78	Review of case authorities	1.5
2-23-78	Review of exhibits and interrogatories	1.0
3-1-78	Review of exhibits and interrogatories	3.0
3-7-78	Review of misc. documents in file	3.5
3-8-78	Review of misc. documents in file	2.5
3-9-78	Review of case authorities	3.0
3-13-78	Review of requests for updated discovery	.75
3-14-78	Review of requests for updated discovery	.5
3-16-78	Review of exhibit lists and exhibits	2.0
3-23-78	Visit to FSH and interviews with patients	8.0
3-30-78	Research and drafting of pre-trial order	3.5
4-6-78	Research and drafting of pre-trial order	3.0
4-10-78	Review of request for inspection	1.0
4-12-78	Research and drafting of pre-trial order	2.5
4-18-78	Research and drafting of pre-trial order	2.0
4-19-78	Research and drafting of pre-trial order	2.0

4-26-78	Research and drafting of pretrial order	1.5
4-27-78	Research and drafting of pre-trial order	2.5
5-3-78	Research and drafting of pre-trial order	2.0
5-4-78	Review of motion to compel	.5
5-10-78	Research & drafting of pre-trial order	2.0
5-12-78	Letter to Boicourt	.25
5-16-78	Prep for pre-trial conference in Jefferson City	1.5
5-17-78	Pre-trial conference in Jefferson City and review of documents in Fulton	9.0
5-24-78	Research and drafting of pre-trial order	1.5
5-30-78	Review of file and settlement offer	2.0
6-6-78	Research & drafting of pre-trial order	3.0
6-7-78	Research & drafting of pre-trial order	2.5
6-8-78	Research & drafting of pre-trial order	2.0
6-20-78	Conference with Mr. Lander & Mr. Hyde concerning settlement offer	.5
6-20-78	Letter to Boicourt	.5
6-20-78	Letter to Judge Hunter	.5
7-6-78	Prep for inspection and travel to Jefferson City	4.5
7-7-78	Inspection at FSH and travel	10.0
8-1-78	Research & drafting of pre-trial order	2.0
8-2-78	Research & drafting of pre-trial order	2.0
8-9-78	Research & drafting of pre-trial order and prep for attorney conference	2.5
8-15-78	Research & drafting of pre-trial order and prep for attorney conference	2.5
8-16-78	Travel to Jefferson City & conference with Boicourt concerning stipulations	9.0
12-20-78	Review of file and prep of motion to depose Hensley	1.5
12-22-78	Prep of motion to depose Hensley	.5
1-8-79	Conversation with Boicourt and confirming letter	.5

1-18-79	Prep for pre-trial conference	1.0
1-19-79	Pre-trial conference in Jefferson City and travel	8.0
1-24-79	Prep for Hensley deposition	2.0
1-24-79	Conference with Professor Carlson and Mr. Hyde	1.0
1-25-79	Prep for Hensley deposition and travel to Jefferson City	6.0
1-26-79	Hensley deposition in Jefferson City and travel	7.5
1-31-79	Review of file materials in prep for trial	2.5
2-15-79	Prep for pre-trial conference	3.5
2-21-79	Review of pleadings	2.5
2-21-79	Conversation with experts	1.5
2-22-79	Conversation with experts	1.0
2-23-79	Conversation with Dr. Brands	1.5
2-26-79	Conversation with experts	1.5
2-26-79	Prep for pre-trial conference	2.0
2-27-79	Prep for pre-trial conference	3.5
2-28-79	Research and drafting of request for inspection	2.0
2-28-79	Conversation with Boicourt	.5
3-1-79	Prep for pre-trial conference	2.5
3-1-79	Conference with Messrs. Bastian & Hyde	.5
3-1-79	Conversation with Boicourt	1.5
3-2-79	Travel to Kansas City for pre-trial conference	5.0
3-2-79	Pre-trial conference in Kansas City	1.25
3-5-79	Review of file and prep of pre-trial submission	6.5
3-6-79	Prep of exhibits	3.5
3-6-79	Prep of pre-trial submission	4.5
3-7-79	Prep of Supplemental exhibits	8.0
3-8-79	Prep of Supplemental exhibits	6.5
3-9-79	Prep of Supplemental exhibits	7.0

3-12-79	Research and drafting of reply to request for inspection	4.0
3-12-79	Prep of Supplemental exhibits	4.5
3-12-79	Conversation with Dr. Brelje	.5
3-13-79	Prep of Supplemental exhibits	3.5
3-13-79	Research and drafting of reply to request for inspection	.5
3-14-79	Prep of Supplemental exhibits	3.5
3-14-79	Prep for meeting with Boicourt re pre-trial order	3.0
3-15-79	Prep for meeting with Boicourt re pre-trial order	.75
3-15-79	Meeting with Boicourt re pre-trial order	4.5
3-15-79	Conversation with Dr. Rundle	.5
3-16-79	Review of proposed stipulations	1.5
3-16-79	Prep of supplemental exhibits	3.5
3-16-79	Conference with Boicourt & Arnett	1.0
3-19-79	File review and document preparation	7.5
3-20-79	Prep of disputed issues	2.0
3-20-79	Conference with Professor Ron Carlson & Mr. Bastian	1.5
3-20-79	Letter to Boicourt	.5
3-20-79	Prep of trial file and exhibits	3.0
3-21-79	Prep of trial exhibits	1.5
3-21-79	Conference with Pete Bastian	.25
3-22-79	Prep of trial exhibits	5.0
3-23-79	Prep of trial exhibits	2.0
3-26-79	File review and prep of trial exhibits	5.5
3-26-79	Conversation with Court Clerk	.25
3-27-79	Prep of trial exhibits	1.0
3-28-79	Prep of exhibits and review of file	6.5
3-29-79	Conversation with Dr. Barclay	.5
3-29-79	General trial prep	7.0
3-30-79	Prep of expert testimony (Dr. Brelje)	6.0
4-2-79	Prep of expert testimony (Dr. Brelje)	8.5

4-3-79	Telephone conversation with Dr. Rubin	.25
4-3-79	Telephone conversation with Dr. Brelje	.5
4-3-79	Telephone conversation with Dr. Rundle	.5
4-3-79	Telephone conversation with Dr. Gilner	.25
4-3-79	Prep of matters related to expert testimony	5.0
4-4-79	Prep of matters related to expert testimony	2.0
4-4-79	Prep of expert testimony	4.0
4-5-79	Prep of pre-trial order	1.5
4-5-79	Prep of expert testimony and review of file	6.5
4-6-79	Prep of expert testimony	3.5
4-6-79	Conversation with Mr. Pascal	.5
4-6-79	Prep for conference with Boicourt	2.0
4-6-79	Brands deposition pleadings	1.0
4-6-79	Conversation with Mike Hoare	.5
4-9-79	Arrangements for Brands deposition	3.0
4-9-79	Prep for defendants' case	4.5
4-9-79	Conversation with Dr. Brelje	.25
4-10-79	Prep of summaries of exhibits	8.0
4-10-79	Arrangements for Brands deposition	1.5
4-11-79	Prep of summaries of exhibits	6.5
4-11-79	Conversation with Boicourt, Judge Hunter's Clerk and letter and proposed order to Court	1.25
4-12-79	Prep of expert testimony	1.5
4-12-79	Meeting with Prof. Carlson re evidence issues	2.0
4-12-79	Prep of Dr. Barclay	2.5
4-12-79	Travel to Columbia	2.5
4-12-79	Meeting with Bill Powell	3.0
4-13-79	Travel to Fulton	.5
4-13-79	Meeting with Boicourt	7.5
4-13-79	Travel to Jefferson City	.5
4-14-79	Travel to Fulton	.5
4-14-79	Meeting with patients	2.5
4-14-79	Meeting with Bonnie McBride	1.5

4-14-79	Travel to St. Louis	2.5
4-15-79	Letter to Court	.25
4-15-79	Phone call to Dr. Rubin	.25
4-15-79	Prep of exhibit summaries	4.5
4-16-79	Travel to Chester	2.0
4-16-79	Prep of Dr. Brelje	5.5
4-16-79	Travel to Carbondale	1.0
4-16-79	Prep of Dr. Rubin	3.0
4-16-79	Travel to St. Louis	2.0
4-17-79	Arranging Brands deposition and other trial arrangements	2.5
4-17-79	Various other trial prep activities	7.0
4-18-79	Prep of summaries	5.0
4-18-79	Trial prep activities	3.0
4-19-79	Trial prep activities—conference with Dr. Gilner	9.0
4-20-79	Travel to Tucson, Arizona and Brands deposition	14.0
4-21-79	Travel back to St. Louis	3.5
4-23-79	Trial prep activities	8.5
4-24-79	Trial prep activities	4.5
4-24-79	Travel to Columbia and meeting with experts	5.5
4-25-79	Trial prep activities in Fulton	7-5
4-25-79	Conference with all experts	1.5
4-25-79	Conference with Dr. Rundle	2.0
4-26-79	Trial prep activities in Fulton	3.5
4-26-79	Conference with Boicourt	4.0
4-26-79	Statement of Dr. Rundle	1.5
4-26-79	Travel back to St. Louis	2.5
4-27-79	Final prep	2.0
4-27-79	Conversation with Boicourt	.5
4-27-79	Prep of Dr. Rundle	5.5
4-28-79	Trial prep	4.5
4-29-79	Travel to Jefferson City	2.5

4-29-79	Trial prep	5.5
4-30-79	In trial (Court Day)	10.5
4-30-79	Trial prep	3.5
5-1-79	In trial (Court Day)	7.0
5-1-79	Trial prep	4.5
5-2-79	In trial (Court Day)	8.0
5-2-79	Trial prep	5.0
5-3-79	In trial (Court Day)	7.5
5-3-79	Trial prep	5.5
5-4-79	In trial (Court Day)	7.0
5-4-79	Travel to St. Louis	2.5
5-6-79	Trial prep	5.5
5-7-79	Trial prep	8.5
5-8-79	Trial prep	2.5
5-8-79	Travel to Jefferson City	2.5
5-8-79	Trial prep	3.0
5-9-79	In trial (Court Day)	7.0
5-9-79	Trial prep	3.5
5-10-79	In trial (Court Day)	7.0
5-10-79	Trial prep	3.5
5-11-79	In trial (Court Day)	7.0
5-11-79	Trial prep	4.0
5-12-79	In trial (Court Day)	6.0
5-13-79	Trial prep	6.5
5-14-79	In trial (Court Day)	8.0
5-14-79	Trial prep	3.0
5-15-79	In trial (Court Day)	7.0
5-15-79	Trial prep	2.5
5-16-79	In trial (Court Day)	7.0
5-16-79	Trial prep	1.5
5-17-79	In trial (Court Day)	3.0
5-17-79	Travel to St. Louis	2.5
5-21-79	Research and drafting of brief	8.5

5-22-79	Research and drafting of brief	8.0
5-23-79	Research and drafting of brief	9.5
5-24-79	Research and drafting of brief	9.5
5-25-79	Research and drafting of brief	10.0
5-28-79	Research and drafting of brief	3.0
5-29-79	Research and drafting of brief	9.5
5-30-79	Research and drafting of brief	10.0
5-31-79	Research and drafting of brief	6.0
6-4-79	Review of defendants' brief	1.5
6-5-79	Review of defendants' brief	2.0
6-8-79	Research and drafting of reply brief	6.0
6-11-79	Research and drafting of reply brief	4.5
6-20-79	Motion to Amend Class	1.0
6-28-79	Reply Memo on Class Motion	.5
8-14-79	Review of Court's Opinion	2.5
9-10-79	Letter to Boicourt	.5
9-21-79	Letter to Boicourt	.5
10-1 ,9	Review of State's Plan	1.5
10-19-79	Conference with Dr. Gilner, and Mr. Bastian regarding State's Plan	1.5
10-23-79	Analysis and stu.., of State's Plan	1.0
10-23-79	Telephone conference with Dr. Rundle regarding State's Plan	.5
10-24-79	Letter to Boicourt	1.5
10-26-79	Telephone conference with Dr. Brelje regarding State's Plan	.25
10-31-79	Telephone conference with Dr. Brelje	.5
10-31-79	Research & drafting of objections to Plan	3.5
11-2-79	Travel to Jefferson City for Court conference	2.5
11-2-79	Conference with Boicourt and Arnett	2.0
11-3-79	Conference with Court on State's Plan	1.25
11-3-79	Travel back to St. Louis	2.5
10-26-79	Research & drafting of Attorneys' Fees Request	3.5

11-15-79	Research & drafting of Attorneys' Fee Request	2.5
11-16-79	Research & drafting of Attorneys' Fees Request	3.0
11-20-79	Research & drafting of Attorneys' Fees Request	2.5
11-21-79	Research & drafting of Attorneys' Fees Request	1.0
11-27-79	Research & drafting of Attorneys' Fees Request	3.0
11-30-79	Research & drafting of Attorneys' Fee Request	3.0
12-27-79	Final drafting of Memorandum	.75
12-27-79	Conference with Professor Carlson and Attorney Bastian	1.0
1-28-80	Conversation with J. Hunter's Clerk	.25
2-4-80	Travel to and from Fulton	5.0
2-4-80	Inspection of FSH	5.0
	TOTAL	817.50

APPENDIX B

ECKERHART V. HENSLEY

A. *Out-Of-Pocket Expenses*

The following expenses were incurred by plaintiffs' attorneys, Legal Services of Eastern Missouri, Inc. (LSEM), in connection with the case of *Eckerhart v. Hensley,* Cause No. 75-CV-87-C (W.D.Mo.):

I. *Expert Fees and Expenses*

a. Dr. Allan Barclay	Fee	$ 750.00
b. Dr. Frank Gilner	Fee	750.00
c. Dr. Frank Rundle	Fee	2,560.00
	Expenses	717.72
d. Dr. Harris Rubin	Fee	750.00
	Expenses	368.66
e. Dr. Terri Brelje	Fee	750.00
	Expenses	161.85
	TOTAL	6,808.29

II. *Trial Expenses*

The following amount was expended by plaintiffs' attorney, LSEM, in connection with the trial of this case in Jefferson City, Missouri, during April 30, 1979 thru May 17, 1979. This amount consists exclusively of meal and lodging costs for plaintiffs' trial counsel, Mr. William A. Hyde, and plaintiffs' experts:

TOTAL	$2,148.65

III. *Miscellaneous Expenses*

The following expenses represent travel and meal expenses during the course of this litigation:

a. Out-of-pocket expenses reimbursed to Attorney Bastian	$ 922.69
b. Out-of-pocket expenses reimbursed to Attorney Berkowitz	636.25
c. Out-of-pocket expenses reimbursed to to Attorney Hyde	1,043.49
d. Out-of-pocket expenses reimbursed to Attorney Carlson	306.85
e. Out-of-pocket expenses reimbursed to Attorney Hexter	210.73
f. Out-of-pocket expenses reimbursed to Attorney Heiser	58.90
g. Out-of-pocket expenses reimbursed to Law Student Rich Wilderson	182.52
TOTAL	$3,361.43

IV. *Taxable Costs*

Depositions of John Maylee, Dr. Bratkowski, and Dr. Tellez	$1,091.18
Depositions of Dr. Bratkowski, Elliott Farley, Dr. Jacks and Joseph Mangini	754.68
Deposition of Dr. Hensley	324.51
Deposition of Dr. Brands	303.40
Xeroxing and reproduction costs	348.46
Witness Fees	36.80
TOTAL	$2,859.03

CERTIFICATE OMITTED IN PRINTING

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

FILED FEB. 26, 1980

TITLE OMITTED IN PRINTING

AFFIDAVIT OF WILLIAM A. HYDE IN SUPPORT OF PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES

I, William A. Hyde, being duly sworn, state as follows:

1. Between January 1975, and March 12, 1979, I was one of the attorneys for the plaintiffs in the above-styled cause. I make this Affidavit in support of plaintiffs' request for an award of attorneys' fees pursuant to 42 U.S.C. §1988.

2. I received my J.D. degree from Saint Louis University School of Law in May, 1974. I became employed as a staff attorney with Legal Services of Eastern Missouri, Inc., in January of 1975. I resigned my position as staff attorney at LSEM in November 1978, and have continued since then to work at LSEM on a volunteer basis.

3. I have been a member of the Missouri Bar since September 1974, and of the Indiana Bar since October 1974.

4. From January 20, 1975, through March 12, 1979, virtually all of my work time at LSEM was devoted to the above-styled case.

5. In Appendix A, attached to this Affidavit, I have set forth a list of the hours I have spent working on this case through March 12, 1979. Because all of my time was devoted to this case I maintained no independent time records. Appendix A is a reconstruction of my time based on a review of the case file. Hours which could not be documented are not included. I estimate that hundreds of hours are undocumented and therefore are not being claimed. Only activities which are documented by the case file are listed. No time has been included for any work subsequent to my withdrawal on March 12, 1979. I estimate, however, that I have devoted several hundred hours to this case since that time.

I have read the above and attached Appendix A and they are true and correct to the best of my knowledge and belief.

SIGNATURES OMITTED IN PRINTING

APPENDIX A

ECKERHART V. HENSLEY

Attorney William A. Hyde

Date	*Activity*	*Time*
1-20-75	Drafted letter to Judge Hunter (for Jim) Sherby), and affidavit attached to letter	.5
1-31-75	Drafted motion to practice pro hoc vice	.25
2-4-75	Drafted letter to Judge Hunter (for Jim Sherby and Chris Hexter)	.5
2-4-75	Drafted motion and suggestions in support to re-date Standard Pre-trial Order No. 1 (for Jim Sherby and Chris Hexter)	.5
2-5-75	Telephone conversation with Michelle White (U.S. Dept. of Justice), and Memo of same	1.0
2-6-75	Letter to Michelle White	.25
2-6-75	Telephone conversation with Dr. Morton Birnbaum, and memo of same	.5
2-8-75	Conference with Richard Boardman	2.0
2-10-75	File review and preparation for pre-trial conference	1.0
2-10-75	Letter to George Dean (private attorney)	.75
2-11-75	Pre-trial conference in Jefferson City	7.0
2-18-75	Read JCAH "Accreditation Manual for Psychiatric Facilities'	2.0
2-18-75	Research at St. Louis University	1.0
2-19-75	Research	1.0
2-19-75	Letter to Michelle White	.5
2-23-75	Reviewing several hundred of pages of affidavits filed by defendants in *Barnes v. Hill*	3.0
2-28-75	Letter to parent of patient Ronald A.	.5
2-28-75	Visit with patients	7.0
3-1-75	Research & drafting of plaintiffs' first Interrogatories and Requests for Documents	4.0

3-3-75	Conference with Chris Hexter and Jim Sherby in re proposed draft of new complaint	.5
3-4-75	Research & drafting of Plaintiffs' First Interrogatories and Requests for Documents	5.5
3-7-75	Research & drafting of Plaintiffs' First Interrogatories and Request for Documents	3.0
3-11-75	Letter to RGB (a patient)	.5
3-12-75	Interview with parents of Ronald A.	1.0
3-14-75	Research	2.0
3-16-75	Research & drafting of Plaintiffs' First Interrogatories and Requests For Documents	6.5
3-18-75	Research & drafting of Plaintiffs' First Interrogatiories and Requests For Documents	4.0
3-19-75	Letter to Ellen McPeake (Mental Health Law Project)	.08
3-19-75	Conference with Mike Boicourt in Jefferson City in re dispute over re-filing the case and plaintiffs' proposed refiling papers	7.0
3-21-75	Research & drafting of Plaintiffs' First Interrogatories and Requests For Documents	4.0
3-24-75	Memorandum to Dave Lander	1.5
3-26-75	Research & drafting of Plaintiffs' First Interrogatories and Requests For Documents	5.0
3-28-75	Conference with supervising attorneys	2.0
3-29-75	Research & drafting of Plaintiffs' First Interrogatories and Requests For Documents	8.0
3-31-75	Letter to Mike Boicourt (for Chris Hexter)	1.0
4-2-75	Conference on Richard Boardman, plus research	2.0
4-3-75	Research at St. Louis University	2.0
4-4-75	Visit with patients	7.0

4-7-75	Reviewed "Manual on Complex Litigation"	2.0
4-8-75	Letter to RGB	.75
4-9-75	Research & drafting of Plaintiffs' First Interrogatories and Requests For Documents	7.0
4-10-75	Drafting "Order Adopting Certain Previous Filed Orders . . ." and Motion for Same	1.5
4-10-75	Drafting "Waiver of Service"	.25
4-10-75	Drafting "Waiver of Statute of Limitations"	.25
4-10-75	Motion to Dismiss, Suggestions in Support of Motion, and Order Granting Dismissal	1.0
4-10-75	Drafting Complaint	3.5
4-11-75	Trip to Jefferson City to conference with Mike Boicourt	7.0
4-14-75	Research & drafting of plaintiffs' First Interrogatories and Request For Documents	3.0
4-15-75	Letter to Judge Hunter	.25
4-15-75	Letter to Mike Boicourt	.25
4-15-75	Letter to Michelle White	.25
4-15-75	Letter to Susan Fox (Mental Health Law Project)	.5
4-15-75	Letter to Jerome Wade (private attorney)	.25
4-15-75	Letter to RGB (a patient)	.25
4-15-75	Conference with Dave Lander	.5
4-24-75	Letter to RGB (a patient)	.25
4-18-75	Conference with Richard Boardman	.5
4-21-75	Letter to Dr. Ralph Biddy	.08
4-21-75	Letter to Dr. Frank Gilner	.08
4-28-75	Memo to Dave Lander	.5
4-28-75	Letter to Judge Hunter	.08
4-28-75	Letter to Mike Boicourt	.16
4-28-75	Drafting Notice to Class of Dismissal	.5
4-29-75	Research & drafting of Motion to Proceed as Class Action and Memorandum of Law	2.0

4-29-75	Meeting with Dr. Ralph Biddy	1.0
5-1-75	Meeting with Dr. Frank Gilner and Dr. Alan Barclay	1.0
5-1-75	Conference with Jesse Goldner	.5
5-2-75	Reorganizing case file	3.0
5-6-75	Letter to Dr. Ralph Biddy	.25
5-6-75	Letter to Dr. George Yard	.08
5-6-75	Letter to Dr. Alan Barclay (and similar letter to Dr. Gilner)	.08
5-9-75	Letter to Ron Roseman (Kansas City Legal Aid)	.25
5-9-75	Letter to Mike Boicourt	.5
5-12-75	Meeting with Dr. Wayne Reinking	2.0
5-13-75	Letter to Dr. Ed Auer	.08
5-15-75	Meeting with Dr. Donald Goodwin	.5
5-19-75	Letter to Dr. James Laue	.08
5-19-75	Letter to Dr. Harold Vitsosky	.75
5-22-75	Meeting with Dr. Ed Auer	1.0
5-22-75	Meeting with Dr. James Laue	.5
5-26-75	Meeting with Dr. Terry Brelje	3.5
5-27-75	Motion in Opposition to Defendants' Request For Extension of Time, and Supporting Memorandum (including cover-letter court and Mr. Boicourt)	2.5
5-29-75	Research & drafting of Plaintiffs' Memorandum of Law on the Applicability of the Eleventh Amendment to Plaintiffs' Claim for Damages in Count II (plus cover letters)	8.0
5-30-75	Letter to Michael Lottman U.S. Department of Justice)	.08
5-30-75	Letter to Dr. Frank Gilner	.5
5-30-75	Letter to Dr. James Laue	.08
5-30-75	Letter to Dr. Wayne Reinking	.25
6-1-75	Visit with patients	7.0
6-2-75	Letter to Dr. Terry Brelje	.25

6-2-75	Letter to Dr. Ralph Biddy	.5
6-4-75	Letter to Mike Boicourt	.5
6-9-75	Letter to Dr. Ralph Biddy	.25
6-10-75	Meeting with Dr. John Tek Lu	1.0
6-13-75	Letter to William Kuehn, U.S. Dept. of Labor	.25
6-13-75	Letter to Mike Boicourt	.25
6-18-75	Letter to Mike Boicourt	1.0
6-19-75	Inspection of documents in Jefferson City	8.0
6-20-75	Review of JCAH survey reports	7.0
6-24-75	Letter to Mike Boicourt	.25
7-1-75	Letter to Margie Stapleton (Natl. Center for Law and the Handicapped)	.08
7-6-75	Visit with patients	7.0
7-8-75	Preparation for and presentation of views to to JCAH accreditation surveyors at Fulton State Hospital	10.0
7-7-75	Letter to National Clearinghouse for Legal Services	.08
7-14-75	Letter (for David Lander), to U.S. Dept. of Justice, Civil Rights Division	3.0
7-16-75	Letter to the American Psychological Association (via Alan Barclay)	1.0
7-21-75	Letter to Paul Friedman (Mental Health Law Project)	.25
7-21-75	Motion to Redate Standard Pre-Trial Order No 1, Memorandum In Support of Motion	1.0
7-25-75	Trip to National Center for Law and the Handicapped	2.5
7-29-75	Letter to Margie Stapleton (National Center for Law and the Handicapped)	.25
8-14-75	Drafting of Motion for Leave to File Amended Complaint, Suggestions In Support of Same, and Proposed Amended Complaint, with cover letter	5.5
8-14-75	Letter to Frazier Baker (local counsel)	.25

8-14-75	Letter to Larry Woods (private attorney)	.16
8-28-75	Letter to Richard Weil, *St. Louis Post-Dispatch*	.25
8-28-75	Letter to Paul Fredman	.5
9-15-75	Review of defendants' responses to plaintiffs' Interrogatories	9.0
9-16-75	Review of defendants responses to plaintiff's Interrogatories	8.0
9-17-75	Review of defendants' responses to plaintiff's Interrogatories	9.0
9-18-75	Review of defendants' responses to plaintiffs' Interrogatroies	6.0
9-18-75	Letter to Patricia Wald (Mental Health Law Project)	.25
9-19-75	Letter to Mike Boicourt	.25
9-19-75	Review of defendants' responses to plaitiffs' Interrogatories	8.0
9-23-75	Letter to Rob McGarrah (American Federation of State County & Municipal Employees)	.25
9-23-75	Letter to A. L. Zwerling (General Counsel for AFSCME)	.50
9-29-75	Letter to Mike Thrasher (U.S. Dept. of Justice)	.50
10-1-75	Supplemental Memorandum In Support of Plaintiffs' Request For Leave To File Amended Complaint	8.0
10-1-75	Letter to Mike Boicourt	.16
10-7-75	Visit with patients	7.0
10-9-75	Letter to Dr. Harold Robb in re RGB	1.0
10-10-75	Letter to RGB (a patient)	.5
10-10-75	Letter to Frazier Baker	.25
10-15-75	Letter to Dr. Terry Brelje	.25
10-16-75	Letter to RGB (a patient)	.25
10-20-75	Letter to Patricia Wald	1.25
10-22-75	Letter to RGB (a patient)	.25
10-24-75	Pre-trial conference in Jefferson City	7.0

10-29-75	Internal file memo in re Fulton's appeal of loss of JCAH accreditation	.5
10-31-75	Letter to RGB (a patient)	.5
11-10-75	Letter to William F. Kuehn, U.S. Dept. of Labor	.75
11-10-75	Letter to Mike Boicourt in re RGB (a patient)	.5
11-11-75	Letter to RGB (a patient)	1.0
11-21-75	Letter to RGB (a patient)	.25
12-3-75	Letter to RGB (a patient)	.25
12-10-75	Letter to Susan Lentz (US Dept. of Justice)	.25
12-11-75	Meeting with Dr. Moisy Shopper	.5
12-11-75	Letter to RGB (a patient)	.5
12-12-75	Motion For Extension of Time to Complete Discovery and Suggestions in Support Thereof	.66
12-23-75	Letter to Mike Boicourt	.25
12-24-75	Research & drafting of responses to defendant's 1st Interrogatories	7.0
12-29-75	Research & drafting of responses to defendants' 1st Interrogatories	7.0
1-5-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
1-8-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
1-9-76	Letter to Dr. Walter Wohlman (JCAH)	.75
1-9-76	Research & drafting of responses to defendants' 1st Interrogatories	6.0
1-9-76	Letter to Ronald A.	.25
1-14-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
1-16-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
1-19-76	Drafting interrogatories and requests for documents in re JCAH accreditation	1.0
1-19-76	Letter to Mike Boicourt	.25

1-19-76	Motion to Extend Time to Respond to Defendants' Interrogatories and Suggestions in Support Thereof	.66
1-19-76	Research & drafting of responses to defendants' 1st Interrogatories	4.0
1-20-76	Letter to Dr. Nichasis Gutierrez	.25
2-9-76	Letter to Judy Cohn (Mental Health Law Project)	.25
2-9-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
2-20-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
2-20-76	Telephone conversation with Mike Boicourt	.25
2-23-76	Letter to Mike Boicourt	.25
2-23-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
2-26-76	Letter to Richard Boardman	.08
2-26-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
3-1-76	Letter to Mike Boicourt	.25
3-1-76	Research & drafting of responses to defendants' 1st Interrogatories	6.0
3-2-76	Research & drafting of responses to defendants' 1st Interrogatories	6.5
3-3-76	Research & drafting of responses to defendants' 1st Interrogatories	7.0
3-3-76	Letter to RGB	.25
3-9-76	Visit with patients	7.0
3-10-76	Letter to Mike Boicourt	.25
3-10-76	Final drafting of responses to defendants' 1st Interrogatories	3.5
3-11-76	Letter to RGB	.5
3-18-76	Reviewing defendants' responses (120 + pages) to the JCAH interrogatories and documents	3.0
3-23-76	Telephone conversation with Boicourt	.25
3-24-76	Letter to William Kuehn (U.S. Dept. of Labor)	.08
3-30-76	Drafting request for documents	2.5

3-30-76	Motion for Extension of Time and Suggestions In Support	1.0
3-30-76	Four separate Notices to Take Depositions	.25
3-30-76	Letter to Mike Boicourt	.75
4-12-76	Preparation for depositions	4.0
4-13-76	Preparation for depositions	6.0
4-22-76	Letter to Mike Boicourt	.25
4-22-76	Preparation for depositions	7.5
4-23-76	Preparation for depositions	7.5
4-24-76	Preparation for depositions	8.0
4-25-76	Preparation for depositions	7.0
4-26-76	Deposition of John Maylee (plus travel to and from Fulton)	6.0
4-28-76	Letter to Mike Boicourt	.25
5-4 & 5-5-76	Deposition of Henry Bratkowski (plus travel to Fulton)	10.5
5-7-76	Deposition of Edward Tellez (plus travel from Fulton)	4.0
5-10-76	Letter to RGB (a patient)	1.0
5-12-76	Letter to RGB (a patient)	.25
5-17-76 to 5-20-76	Inspection and copying of documents at Fulton (including travel to Fulton) plus memo summarizing what was obtained)	30.0
5-21-76	Deposition of Richard Jacks (plus travel from Fulton)	6.0
5-24-76	Review and analysis of defendants' documents	7.0
5-25-76	Review and analysis of defendants' documents	7.5
5-25-76	Letter to RGB	.25
5-25-76	Internal file memo in re general discovery strategy	.5
5-25-76	Internal file memo in re strategy on experts' inspection	1.0
5-25-76	Internal file memo in re defendants' refusal to answer questions at their depositions	1.0

5-26-76	Review and analysis of defendants' documents	8.0
5-26-76	Letter to Mike Boicourt	.5
5-27-76	Drafting supplemental interrogatories	1.0
5-27-76	Review and analysis of defendants' documents	8.0
5-28-76	Review and analysis of defendants' documents	8.0
5-31-76	Meeting with Dr. Harry Rubin	3.0
6-2-76	Meeting with Dr. Terry Brelje	4.0
6-3-76	Review and analysis of defendants' documents	5.0
6-4-76	Review and analysis of defendants' documents	2.0
6-7-76	Review and analysis of defendants' documents	7.0
6-8-76	Memo to Dave Lander	1.75
6-8-76	Letter to Mike Boicourt	.5
6-8-76	Letter to Terry Brelje	.25
6-8-76	Review and analysis of defendants' documents	5.0
6-9-76	Review and analysis of defendants' documents	6.0
6-10-76	Review and analysis of defendants' documents	6.5
6-11-76	Review and analysis of defendants' documents	2.0
6-14-76	Meeting with Dr. Bernard Rubin (in Chicago)	13.5
6-17-76	Letter to RGB	.25
6-17-76	Review and analysis of defendants' documents	6.0
6-18-76	Review and analysis of defendants' documents	5.0
6-21-76	Letter to Dr. Bernard Rubin	.75
6-22-76	Drafting request for on-site inspection	2.5
6-22-76	Letter to Mike Boicourt	.5

6-22-76	Motion for Voluntary Dismissal of Count II and Suggestions in Support	2.5
6-22-76	Motion for Extension of Time, Suggestions in Support	1.0
6-22-76	Review and summary of discovery file for internal use	4.5
6-23-76	Letter to RGB (a patient)	.25
6-23-76	Review and summary of discovery file for internal use	9.5
6-24-76	Letter to plaintiffs' five experts	1.25
6-24-76	Review and summary of discovery file for internal use	5.0
6-25-76	Letter to RGB (a patient)	.25
6-25-76	Review and analysis of defendants' documents	1.0
6-29-76	Letter to RGB (a patient)	.25
7-1-76	Review and summary of discovery file for internal use	5.0
7-2-76	Letter to Mike Boicourt	.25
7-2-76	Review and summary of discovery file for internal use	5.5
7-6-76	Review and analysis of defendants' documents	6.0
7-7-76	Review and summary of discovery file for internal use	6.5
7-8-76	Review and summary of discovery file for internal use	6.0
7-8-76	Reviewing defendants' "Response to (Plaintiffs') Request For Entry Onto Premises," Preparing for Scheduled Pre-trial Conference on the Matter	2.5
7-9-76	Pre-trial conference in Jefferson City, and travel to and from	8.0
7-12-76	Drafting interrogatories and request for documents relating to Forensic Unit funding	2.0
7-12-76	Review and analysis of defendants' documents	3.0

7-13-76	Review and analysis of defendants' documents	5.0
7-14-76	Review and analysis of defendants' documents	2.5
7-15-76	Preparation for on-site inspection and travel to Columbia	10.0
7-16-76	On-site inspection and discussion with expert panel at night	12.0
7-17-76	On-site inspection and travel back	8.5
7-21-76	Letters to Dr. Brelje and Rubin (Harry)	.5
7-26-76	Letter to Prof. Ron Carlson, for David Lander	.75
7-26-76	Review and analysis of defendants' documents	6.0
7-27-76	Meeting with Dr. John Tek Lum	.5
8-2-76	Letter to Mike Biocourt	.25
8-2-76	Memo to associate director concerning on-site inspection	1.0
8-9-76	Conference with Prof. Carlson and Mr. Lander	2.0
8-9-76	Letter to RGB (a patient)	.25
8-24-76	Research and drafting of motion to compel answers to deposition	2.0
8-24-76	Meeting with Dr. Nathan Blackman	1.0
8-25-76	Letter to Dr. Nathan Blackman	.25
8-25-76	Research & drafting of motion to compel answers to deposition	3.0
8-26-76	Research and drafting of motion to compel answers to deposition	7.0
8-27-76	Letter to Mike Boicourt	.25
8-27-76	Research & drafting of Motion to Compel Answers to Questions Oral Examination and Suggestions in Support Thereof, with attached Exhibits "A", "B", and "C"	8.0
8-31-76	Letter to Mike Boicourt	.25
8-31-76	Drafting interrogatory on experts	.25
9-3-76	Letter to Mike Boicourt	.25

9-3-76	Review and analysis of defendants' documents	5.5
9-8-76	Conference with Prof. Carlson & David Lander	2.0
9-8-76	Review and analysis of deefndants' documents	5.0
9-10-76	Inspection and copying of medical records in Biggs, travel, summarizing memo	8.0
9-13-76	Two Deposition Notices	.25
9-27-76	Conference with Prof. Carlson & Rick Wilderson concerning Dr. Bratkowski's deposition	1.5
9-30-76	Letter to plaintiffs' five experts	.25
10-8-76	Letter to Mike Biocourt along with proposed joint letter to the Court resolving discovery dispute	.5
10-12-76	Conference with Prof. Carlson and Mr. Lander concerning Dr. Jacks' deposition	1.5
10-14-76	Letter to Mike Boicourt with alternative proposed joint letter to the Court	1.5
10-19-76	Conference with Prof. Carlson concerning Mr. Maylee's deposition	1.25
10-19-76	Letter to Mike Boicourt	.25
10-20-76	Letter to Judge Hunter	.25
10-20-76	Letter to Mike Boicourt	.08
10-21-76	Joint letter to the Court by parties' counsel	.25
10-22-76	Letter to Judge Hunter	.08
10-24-76	Visit with patients	7.0
10-26-76	Letter to RGB (a patient)	.25
11-2-76	Conference with Prof. Carlson	1.0
11-5-76	Letter to Dr. Dan Jacobs	.25
11-5-76	Review and analysis of defendants' documents	3.0
11-10-76	Telephone conference with Prof. Carlson	.25
11-12-76	Conference with Prof. Carlson	1.5
11-15-76	Letters to Mike Boicourt concerning upcoming depositions	1.0

11-17-76	Deposition of Elliot Farley, plus travel to Fulton	4.0
11-17-76	Deposition of Henry Bratkowski, plus travel back	5.5
11-19-76	Letter to Drs. Alan Barclay, Frank Gilner, Harry Rubin, and John Tek Lum	.25
11-22-76	Depositions of Emerson Marshall and Richard Jacks, respectively, and travel	8.0
12-3-76	Motion for Leave to Have Court Return Certain Papers to Plaintiffs' Counsel	.5
12-9-76	Conference with Prof. Carlson	1.5
12-13-76	Motion For Designation As Complex Case and Request for Pre-trial Conference, Suggestions In Support	1.0
12-17-76	Conference with Professors Carlson and Newburger	1.0
1-3-77	Letter to Rona Beck (Mental Health Law Project)	.5
1-3-77	Letter to Dr. Terry Brelje and Dr. Harry Rubin	.25
1-3-77	Letter to Dr. Frank Gilner	.16
1-3-77	Letter to Dr. Lum	.25
1-5-77	Letter to Judge Hunter	.25
1-5-77	Proposed Memorandum and Special Pre-trial Order No. 1	9.0
1-5-77	Telephone conference with Prof. Carlson concerning Pre-trial Orler No. 1	.25
1-6-77	Telephone conference with Prof. Carlson concerning Pre-trial Order No. 1	.75
1-14-77	Telephone conversation with Prof. Carlson	.25
1-17-77	Pre-trial Conference in Jefferson City, and travel to and from	7.0
1-20-77	Letter to Ed Sweeney (State Representative)	1.0
1-20-77	Letter to Dr. Lum	.25
2-1-77	Letter to Ed Sweeney	.08
2-1-77	Letter to Mr. Boicourt and proposed Amended Complaint	8.5

2-2-77	Meeting with Dr. Lum	.5
2-7-77	Letter to Dr. Lum	.25
2-8-77	Letter to Drs. Rubin, Barclay, Brelje and Gilner	.25
2-9-77	Telephone conference with Prof. Carlson	1.0
2-17-77	Conference with Prof. Carlson and Mr. Wilderson concerning Amended Complaint	1.0
2-17-77	Research & drafting Brief in Support of Motion for Leave to File Amended Complaint	10.0
2-17-77	Letter to Mike Boicourt	.5
2-18-77	Letter to Ed Sweeney	.16
2-22-77	Pre-trial Conference in Jefferson City, and travel	7.0
2-24-77	Letter to Dr. Lum	.25
2-24-77	Telephone conversation with Prof. Carlson	.5
3-3-77	Conference with Prof. Carlson	1.25
3-9-77	Telephone conference with Prof. Carlson	1.25
3-14-77	Reply Brief to Defendants' Suggestions in Opposition to Plaintiffs' Motion for Leave to File Amended Complaint	7.0
3-17-77	Telephone conversation with Mr. Boicourt, discovery file review, and drafting of Parties' Joint Stipulation on Class, including cover letter to Judge Ralston	7.0
3-21-77	Letter to Mike Boicourt	.25
3-22-77	Telephone conference with Prof. Carlson	.25
3-24-77	Conference with Messrs. Carlson, Wilderson, and Newman concerning expert testimony	1.0
4-4-77	Letter to RGB (a patient)	.75
4-6-77	Telephone conference with Prof. Carlson	.25
4-8-77	Conference with Prof. Carlson	2.0
4-8-77	Letter to Paula Kuzmich (JCAH)	.5
4-12-77	Letter to RGB (a patient)	1.0
4-14-77	Letter to Mike Boicourt	.25

4-20-77	Telephone conference with Prof. Carlson	.25
4-22-77	Telephone call to father of Steve A.	.5
4-25-77	Letter to father of Steve A. (a patient)	.08
4-25-77	Telephone conference with Prof. Carlson	.25
4-25-77	Reorganization and review of discovery file	6.0
4-26-77	Visit with Steve A. (a patient)	6.0
4-29-77	Internal file memo regarding the waiting list in Biggs	.5
5-2-77	Letter to RGB (a patient)	.25
5-5-77	Internal file memo regarding the waiting list in Biggs	.25
5-9-77	Telephone conference with Prof. Carlson	.25
5-9-77	Letter to Mike Boicourt	.5
5-11-77	Conference with Prof. Carlson and Mr. Wilderson concerning pre-trial hearing	1.5
5-12-77	Pre-trial conference, Jefferson City, Travel	7.0
5-12-77	Draft of Proposed Pre-trial Order, offered by plaintiffs at conference	3.0
5-13-77	Telephone conference with Prof. Carlson regarding attorneys' fees	.25
5-16-77	Letter to Joe Simanek (Kansas City Legal Aid)	.5
5-16-77	Letter to Mike Boicourt	.25
5-18-77	Letter to Judge Ralston in response to defendants' letter to Judge Ralston concerning plaintiffs' proposed pre-trial order	1.0
5-19-77	Letter to Judge Ralston	.08
5-19-77	Conference with Prof. Carlson	1.25
5-23-77	Drafting Motion for Admission to Practice Pro Hoc Vice (for Ron Carlson)	.33
6-7-77	Letter to RGB (a patient)	.5
6-8-77	Letter to Judge Ralston	.25
6-13-77	Letter to Ed Sweeney	.5
6-17-77	Telephone conversation with Judge Ralston and Mike Boicourt	.25

6-20-77	Letter to Mike Boicourt	.25
6-21-77	Letter to plaintiffs' five experts	.5
6-22-77	Research and drafting of settlement proposal	3.0
6-23-77	Research and drafting of settlement proposal	5.0
6-24-77	Research and drafting of settlement proposal	7.0
6-28-77	Letter to Mike Boicourt	.25
6-28-77	Research and drafting of settlement proposal	4.5
7-1-77	Research and drafting of settlement proposal	7.0
7-5-77	Research and drafting of settlement proposal	2.5
7-5-77	Letter to Chris Hexter	.08
7-5-77	Letter to Walter Heiser	.16
7-5-77	Letters to Drs. Brelje and Gilner	.25
7-5-77	Letter to Mike Boicourt	.5
7-6-77	Research and drafting of settlement proposal	7.0
7-7-77	Research and drafting of settlement proposal	7.0
7-8-77	Research and drafting of settlement proposal	7.0
7-13-77	Letter to Mike Boicourt	.16
7-27-77	Pre-trial conference, Jefferson City	7.0
7-29-77	Letter to plaintiffs' five experts	.25
7-29-77	Letter to Professor Jesse Goldner	2.5
8-1-77	Letter to Judge Ralston	.75
8-2-77	Letter to Mike Boicourt	.5
8-3-77	Amended Complaint	1.0
8-13-77	Review of denfendants' Answer to Amended Complaint	.5
8-15-77	Letter to Jesse Goldner	.08
9-6-77	Letter to Judge Hunter	.5

9-8-77	Drafting proposed Pre-trial Order, cover letter to Mr. Boicourt	3.0
9-12-77	Pre-trial conference in Jefferson City	7.0
9-12-77	Letter to Mike Boicourt in re Tom E. (a patient)	.25
9-15-77	Letter to Tom E. (a patient)	.25
9-19-77	Letter to Jesse Goldner	.08
9-19-77	Research & drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	4.0
9-21-77	Research and drafting responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
9-23-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
9-26-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
9-28-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
9-30-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-3-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-5-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-10-77	Motion to Extend Time and Suggestions in Support	1.33
10-11-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-13-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0

10-14-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-18-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-19-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-20-77	Letter to Tom E. (a patient)	.25
10-20-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-21-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-27-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-28-77	Plaintiffs' List of Witnesses, with cover letter	.5
10-28-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-31-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
10-31-77	Letter to Mike Boicourt in re Tom E. (a patient)	.25
11-1-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-4-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-7-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-8-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0

11-11-77	Motion to Extend Time and Suggestions in Support	.66
11-11-77	Research and drafting of responses to defendants' Interrogatories directed toward Plaintiffs' Amended Complaint	2.5
11-14-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-17-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-21-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-28-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-29-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
11-30-77	Research and drafting of responses to defendants' Interrogatories directed toward plaintiffs' Amended Complaint	7.0
12-2-77	Visit with patients	7.0
12-5-77	Letter to Ron Carlson	.25
12-6-77	Letter to Tom E. (a patient)	.25
12-7-77	Letter to Terry Brelje	.5
1-9-78	Reviewing entire discovery file (all answers to interrogatories, documents, etc.); determining which should be listed as exhibits; organizing and marking exhibits; drafting plaintiffs' list of exhibits	6.0
1-10-78	Reviewing entire discovery file (all answers to interrogatories, documents, etc.); determining which should be listed as exhibits; organizing and marking exhibits; drafting plaintiffs' list of exhibits	7.0

1-11-78	Reviewing entire discovery file (all answers to interrogatories, documents, etc.); determining which should be listed as exhibits; organizing and marking exhibits; drafting plaintiffs' list of exhibits	3.0
1-12-78	Reviewing entire discovery file (all answers to interrogatories, documents, etc.); determining which should be listed as exhibits; organizing and marking exhibits; drafting plaintiffs' list of exhibits	3.0
1-13-78	Letter to Mike Boicourt	.25
1-19-78	Telephone conversation with Terry Brelje	.25
1-19-78	Conference with Mr. Berkowitz	1.0
1-19-78	Preparation of list of exhibits	5.0
2-1-78	Letters to Mike Boicourt	1.0
2-1-78	Exchange of exhibits and inspection of defendants' exhibits at Jefferson City, plus conference with Mr. Boicourt, plus travel time	11.0
2-3-78	Letter to Mike Boicourt	.25
2-13-78	Joint letter from parties' counsel (drafted by Hyde) to Judge Ralston in re stipulation on exhibits	.5
2-18-78	Letter to Mike Boicourt	.25
2-28-78	Analysis of medical records of patient Joseph G., preparation of plaintiffs' Exhibit No. 322 (chart) plus detailed verbal summary of deficiencies in the use of seclusion/restraints shown by the chart	6.0
3-1-78	Analysis of medical records of patient Joseph G., preparation of plaintiffs' Exhibit No. 322 (chart) plus detailed verbal summary of deficiencies in the use of seclusion/restraints shown by the chart	8.0
3-2-78	Analysis of medical records of patient Joseph G., preparation of plaintiffs' Exhibit No. 322 (chart) plus detailed verbal summary of deficiencies in the use of seclusion/restraints shown by the chart	3.0

3-3-78	Analysis of medical records of patient Joseph G., preparation of plaintiffs' Exhibit No. 322 (chart) plus detailed verbal summary of deficiencies in the use of seclusion/restraints shown by the chart	5.0
3-17-78	Drafting plaintiffs' updating-of-discovery requests	3.5
3-21-78	Letter to Judge Ralston	.08
3-28-78	Letter to Michael J. Hoare, Esq.	.25
4-7-78	Letter to plaintiffs' five experts	.16
4-11-78	Drafting request for on-site inspection	2.0
4-26-78	Parties' stipulations re exhibits, and cover letter to Boicourt	1.75
5-2-78	Review of defendants' responses to "updated" discovery requests, and charting and summarizing the random sample of Treatment Plans and Staff Notes	8.0
5-3-78	Review of defendants' responses to "updated" discovery requests, and charting and summarizing the random sample of Treatment Plans and Staff Notes	8.0
5-4-78	Review of defendants' responses to "updated" discovery requests, and charting and summarizing the random sample of Treatment Plans and Staff Notes	4.0
5-5-78	Motion and Suggestions to Compel Answer to Interrogatories	1.0
5-5-78	Request for Supplementation	.25
5-5-78	Letter to Mike Boicourt	.25
5-8-78	Letter to Judge Ralston	.25
5-17-78	Pre-trial conference at Jefferson City and documents inspection at Fulton	9.0
5-19-78	Letter to Dr. Barclay	.08
5-23-78	Letter to plaintiffs' five experts	.5
5-25-78	Letter to plaintiffs' five experts	.5

6-10-78	Listening to tape-recordings of the testimony of C. Duane Hensley and others given before a State legislative mental health committee at St. Louis State Hospital on 5-23-78, and summarizing relevant parts	3.0
6-15-78	Freedom of Information Act request letter in re documents pertaining to April, 1978, Medicare inspection of Fulton State Hospital by Natl. Institute of Mental Health team	.5
6-16-78	Letter to Mr. Boicourt	.25
6-16-78	Letter to Judge Ralston with proposed Order	1.5
6-20-78	Conference with Messrs. Berkowitz and Lander concerning plaintiffs' offer of settlement	.5
6-20-78	Letter to Mr. Boicourt re withdrawal of settlement offer	.25
6-23-78	Letter to plaintiffs' five experts	.25
6-30-78	Review of documents obtained through FOIA request	2.0
7-6-78	Preparation for on-site inspection plus travel to Columbia	6.0
7-7-78	On-site inspection (plus travel time back)	10.0
7-12-78	Work on proposed findings of fact and conclusions of law	10.0
7-14-78	Letter to Dr. Brelje, Dr. Barclay, Dr. Rubin, and Dr. Gilner	2.0
7-31-78	Summary of Information Pertaining to Experts Trial Testimony	2.0
8-10-78	Letter to Mike Boicourt	.16
8-14-78	Memo to associate director concerning plaintiffs' second on-site inspection	.75
8-16-78	Negotiations between parties' counsel in Fulton in re stipulations of fact, and travel to and from	9.0
8-22-78	Letter to Terry Brelje	.08
8-22-78	Letter to Frank Gilner	.08

8-23-78	Letter to Mike Boicourt	.25
8-31-78	Letter to Terry Brelje	.16
8-31-78	Letter to Frank Gilner	.16
10-2-78	Preparation of charts and summaries	7.0
10-3-78	Prepartion of charts and summaries	7.0
10-4-78	Preparation of charts and summaries	7.0
10-5-78	Preparation of charts and summaries	7.0
10-6-78	Preparation of charts and summaries	7.0
10-10-78	Preparation of charts and summaries	5.0
10-18-78	Research at St. Louis University on published articles of Dr. Jonas Rappeport	7.0
10-18-78	Letter to Alan Barclay	.08
10-18-78	Letter to Frank Gilner	.08
10-18-78	Letter to Terry Brelje	.08
11-9-78	Letter to RGB (a patient)	.25
11-9-78	Letter to Harry Rubin	.08
11-14-78	Letters to Brelje and Gilner	.08
11-20-78	Listening to tape-recordings of the testimony of C. Duane Hensley, James K. Ritterbush, and Donald Peterson given before a state legislative mental health committee in Jefferson City on 11-9-78, and memorandum to co-counsel regarding same	3.0
11-27-78	Memo to co-counsel re possible deposition of C. Duane Hensley	.25
12-26-78	Letter to Michael Boicourt	.16
12-26-78	Letter to Alan Barclay	.5
1-2-79	Letter to Drs. Brelje, Barclay, Gilner and Rubin	.25
1-2-79	Memo to co-counsel re the deposition of C. Duane Hensley	3.0
1-24-79	Conference with Prof. Carlson and Mr. Berkowitz	1.0
2-16-79	Letters to Drs. Brelje, Barclay, Gilner and Rubin	.25

3-1-79	Conference with Mr. Bastian and Mr. Berkowitz	.25
3-8-79	Travel to Fulton to interview patients with stop in Mexico to interview Mr. Atkins	8.0
3-12-79	Withdrawal of Appearance	.25
	TOTAL	1,428.79

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

AFFIDAVIT OF MICHAEL BASTIAN IN SUPPORT OF PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES

I, Michael Bastian, being first duly sworn, depose and state as follows:

1. I am presently one of the attorneys of record for the plaintiffs in the above-styled cause. I make this Affidavit in support of plaintiffs' request for an award of attorneys' fees.

2. I received my J.D. degree from St. Louis University School of Law in May 1974. While in law school I was on the staff of the St. Louis University Law Journal. Subsequent to graduation I became licensed, by examination, to practice law in Missouri in September 1974, and licensed, by examination, in Illinois in April 1975.

3. From August 1, 1974, to July 31, 1976, I was employed as a staff attorney with Land of Lincoln Legal Assistance Foundation in Cairo, Illinois. During that period I devoted considerable portions of my time to Federal prison reform litigation, including: *Caudill* v. *Israel*, No. 74-237-E (E.D.Ill.) (medical care case involving lack of care to hepatitis victims in Menard Penitentiary); *Shockey* v. *Sieloff*, No. CV74-193-E (E.D.Ill. (class action First

Amendment religion case involving Menard Penitentiary); and *Lightfoot* v. *Walker*, No. CV-73-238-E (E.D.Ill). (class action medical care case involving Menard Penitentiary segregation and isolation units). In addition I was involved in several civil rights act cases involving alleged race discrimination including, in discovery, stages *Kendrick, et al.* v. *Walder, et al.*, No. CV73-19-C (E.D.Ill.) (class action voting rights case challenging at-large system of City Commission form of government in Cairo, Illinois).

4. In August 1976, I became employed by Legal Services of Eastern Missouri, Inc., in the main office in St. Louis. From August 1976, to the present time I have devoted 90% of my time to problems in mental health law, including individual representation of respondents in civil commitment proceedings, guardianships and juvenile proceedings. In addition to litigation I was active in legislative efforts which culminated in the passage of S.B. 651—the revision of Missouri's civil commitment and voluntary hospitalization code in the 1977-78 legislative season. I was advisor and counsel for the mental health clinical law project of Saint Louis University School of Law during the 1976-77 and 1977-78 terms.

5. I was co-counsel in the litigation of the medical care issues tried before Judge James L. Foreman in the *Lightfoot* case, *supra*. The trial of these issues consumed approximately eight weeks and was concluded in November 1977.

6. In addition to by actual work experience I have attended numerous training conferences concerned with civil rights litigation and Federal practice, including the Federal Civil Rights Litigation conferences sponsored by the Practising Law Institute held in 1977 and 1978; the Federal Rules of Evidence seminar sponsored by the Il-

linois Continuing Legal Education Institute in Spring, 1976; and the Federal Practice Training conference sponsored by the Legal Services Corporation in August, 1978.

7. In Appendix A attached to this Affidavit I have set forth a list of hours I have worked on this case. No time has been included for any work performed by legal assistants. The Appendix was typed from a daily time sheet I maintained in connection with this case. The Appendix does not include any time spent in connection with plaintiffs' request for attorneys' fees. This work will be reported when appropriate.

9. I have read the foregoing and the attached Appendix and the facts stated therein are true to my best knowledge, information and belief.

SIGNATURES OMITTED IN PRINTING

APPENDIX A

ECKERHART V. HENSLEY

Attorney Michael Bastian

Date	*Activity*	*Time*
2-1-79	Started working on case full-time. Case file review and colating documents	4.0
2-2-79	Talked to Eckerhart	1.0
2-2-79	Talked with Steven Moore re Biggs Read Advance Sheet prison cases	1.5
2-5-79	Conversation with Harvey Grossman re expert witnesses	.5
2-5-79	Went to St. Louis University Law Library to research Rappaport's articles	2.0
2-6-79	Discussion with legislator re Biggs budget	.5
2-6-79	Prepared exhibits for trial	2.5
2-7-79	Pleadings review and reorganization	3.0
2-8-79	Telephone call re A.P.A. standards	.5
2-8-79	Telephone call re Nursing Standards	.5
2-9-79	Case review with Hyde	1.5
2-9-79	Conversation with expert (Barclay)	.5
2-12-79	Organized medical charts	2.0
2-14-79	Review of all experts reports	3.0
2-15-79	Prepare for Pre-trial conference and for Jefferson City contacts re Budget	2.0
2-16-79	Jefferson City Pre-trial Conference and travel time	7.0
2-20-79	Conversation with nursing staff at State re medication procedures	.5
2-22-79	Finished pleading reorganization files III, IV, V	1.5
2-23-79	Prepared Motion to Practice Pro Hoc Vice	1.0
2-27-79	Met with Steve Moore—former Biggs patient	2.0
2-28-79	Prepare for pre-trial conference on 2nd	2.0

3-1-79	Pre-trial conference preparation—consultation with Mr. Hyde and Mr. Berkowitz	1.0
3-2-79	Travel to Kansas City for pre-trial and return	5.0
3-2-79	Pre-trial Conference	1.25
3-5-79	Conversation with Public Defenders (City) re Biggs patients	.5
3-5-79	Conversation with Public Defenders (City) re Biggs patients	.5
3-7-79	Called Biggs for visit	.25
3-8-79	Travel to Fulton with Bill Hyde to visit patients and return and to Mexico, Missouri. Visit with Atkins witness	6.0 2.0
3-9-79	Pleadings file update	.5
3-9-79	Research on expert witnesses proof	.5
3-9-79	Summaries of patient interviews	2.0
3-9-79	Conversation with City Public Defender	1.5
3-12-79	Travel to Fulton	3.0
3-12-79	Visit with inmates	3.0
3-12-79	Travel to Columbia—visit with witness McBride	.5
3-12-79	Travel to Columbia—visit with witness B. Powell	1.0
3-13-79	Travel to Fulton from Columbia	.5
3-13-79	Visit with patients	2.0
3-13-79	Copy records	1.5
3-13-79	Travel to St. Louis	2.5
3-14-79	Prepare stipulation conference	2.0
3-14-79	Prepare summaries of witness interviews	2.0
3-14-79	Travel to City Courthouse for record copying	.5
3-14-79	Record copying Norman, Rodney	1.5
3-14-79	Conversation with Public Defender re Rodney and Charles Peyton	1.0
3-15-79	Boicourt and Arnett here for stipulation conference	4.5

3-16-79	Boicourt and Arnett Conference	1.5
3-16-79	Review of Stipulation proposals	.5
3-16-79	Expert witness prep. of Barclay re review of his report, C.V.—Standards in M.R.	1.5
3-19-79	Conversation with Mr. Atkins	.5
3-19-79	Review of A.P.A., NIMH JACH standards	1.5
3-19-79	St. Louis University Library re Rappaport publications for use on cross.	1.5
3-19-79	Conversation with City Defenders re R. Norman and C. Peyton	.5
3-20-79	Consultation with Ron Carlson	1.5
3-20-79	Telephone call to A.P.A. re Task Force Report	.25
3-20-79	Telephone call to Brian Lawlor re *Karc* v. *Conn*	.10
3-20-79	Telephone call to Brian Lawlor re Karc v. Conn	.75
3-20-79	Memo-internal on M.R. standards	2.1
3-20-79	Telephone conversation with Harvey Grossman re Standards, proof of past conduct, remedial measures	.50
3-21-79	Xerox treatment plans	1.0
3-21-79	Internal Memo on M.R.	1.0
3-21-79	Memos to Ron Carlson re proof	.5
3-21-79	Telephone call to Sally Elston, Attorney Harrington v. DeVito—MR's	.5
3-21-79	Copying treatment plans for experts	.5
3-21-79	Telephone call to Mr. Atkins, Mexico, MO	.5
3-21-79	MR. Memo	1.0
3-21-79	Case research LW, Clearinghouse	1.0
3-22-79	Telephone call to Court Reporter Rita Cooke re Evans & Pryor	.25
3-22-79	Research MR cases	1.10
3-23-79	Review of Treatment Plans—screened for MR's	1.0

3-26-79	Patient witness—review files for Tuesday & Wednesday interviews	1.5
3-26-79	Call to Dr. Barclay	.15
3-27-79	Fulton—visited two patients, reviewed their medical charts	3.0
3-27-79	Visited ex-employees—Columbia	1.5
3-27-79	Travel to Fulton & Columbia	3.0
3-28-79	Interview with Steve Atkins, Fulton	1.0
3-28-79	Interview with Rodney Norman—Biggs	1.0
3-28-79	Review of files	2.0
3-28-79	Travel to St. Louis	2.5
3-29-79	Prepared summaries of patient facts	2.5
3-29-79	Prepared my exhibit file for trial	1.5
3-29-79	Telephoned Mr. Atkins	.25
3-29-79	Telephoned Public Defender	.25
3-29-79	Consulted with other attorneys on new evidence	1.0
3-30-79	Went to library at St. Louis Univ. and did research on prison cases and Right to Treatment cases	2.0
3-30-79	Telephone to Eckerhart	.30
3-31-79	Finished out of court statements	2.0
3-31-79	Draft of Barclay testimony	1.0
4-3-79	Barclay/preparation for testimony session	1.0
4-3-79	Contact MR people—Telephone to Dr. Joan Oliver—St. Louis Univ.	.75
4-4-79	Inspected and evaluated Treatment Plans Staffings and Answers to Interrogatories	2.0
4-4-79	Selected out MR and OBS plans for Barclay	1.5
4-4-79	Read and indexed Hensley deposition	1.75
4-5-79	Listed admissions from Hensley deposition	1.0
4-5-79	Talked on telephone to Brian Lawlor, Attorney in Kentucky, MR case	.6
4-5-79	Telephone to Barclay's office	.1
4-5-79	Begin summary for court testimony of MR and OBS Treatment Plans (Exhibit 853)	1.0

4-6-79	MR plans	2.0
4-6-79	Phone calls to Bonnie McBride	.5
4-6-79	Reviewed R. Taylor's records, R. Norman's records, Vernon Walker's records, Eckerhart file	1.5
4-9-79	Work-up Barclay testimony	1.0
4-9-79	Re-do MR summaries	1.0
4-9-79	Notes on stipulations	.5
4-9-79	Review Kentucky MR case transcript	.5
4-9-79	Telephone Steve Hulsey—ex-Biggs patient	.5
4-9-79	Telephone Bill Powell (11:30 at night)	.5
4-10-79	Review Ex. 792 a & b—summaries of same	1.0
4-10-79	Outline patient testimony	1.0
4-10-79	Research use of exhibits—re Norman court record	.5
4-10-79	Telephone Judge McBride re transcript of Pryor and court reporter, same	.5
4-10-79	Sent MR exhibits to Barclay	.5
4-10-79	Telephone Brian Lawlor—Louisville Attorney in Kentucky MR case re experts	.5
4-10-79	Telephone Nancy Elson—Chicago—Cook County Jail case	.2
4-10-79	Review and mark Hensley deposition	.5
4-11-79	Extract MR standards from Medicare Regs.	1.0
4-11-79	Telephone Tom Kennedy re JACH standards	.5
4-11-79	Review A.P.A. Journal re Right To Treatment	.5
4-11-79	Research on epilepsy medications	.5
4-11-79	PDR search re "Ritalin"	.5
4-11-79	Talk to Dr. Mazur re Ritalin and patient	.5
4-12-79	Barclay exhibits—standards	.5
4-12-79	Research—"Normalization" of MR's	.5
4-12-79	Meeting with Ron Carlson re trial strategy	2.0
4-12-79	Meeting—Prof. Barclay re trial testimony 1:30-4:00 here	2.5
4-12-79	Drive to Columbia	2.0

4-12-79	Meet with Bill Powell—7-10:45 p.m.	3.75
4-13-79	Meet with Mike and Bill Arnett re stipulations 9:30 a.m.-6:00 p.m.	8.5
4-14-79	Meet with patients at Biggs—R. Taylor R. Norman—9:30-12:00	2.5
4-14-79	Meet with Bonnie McBride in Fulton 12:00-2:00	2.0
4-14-79	Drive to St. Louis	2.0
4-15-79	Work in office summarizing meetings with witness review stipulations	2.0
4-16-79	Drive to Chester, Illinois	2.0
4-16-79	Meet with Brelje	5.0
4-16-79	Drive to Carbondale	1.0
4-16-79	Meet with Dr. Rubin	5.0
4-16-79	Drive to St. Louis	3.0
4-17-79	Summary of R. Taylor Testimony	.5
4-17-79	George Taylor file review	1.0
4-17-79	Talk with ACLU re G. Taylor	.5
4-17-79	Talk with Attorney Mike Wolf re G. Taylor—office	1.0
4-17-79	Review 792 exhibit re Taylor	.5
4-17-79	Summary of R. Norman evidence	.5
4-17-79	Review of Ralph Taylor medical records	.5
4-17-79	Talk with Steve Atkins father	.5
4-17-79	Review Juvenile cases—Moraleor v. Truman	.5
4-17-79	Prepare Treatment for paralegals further summary, speech and hearing	.5
4-17-79	Review KY transcript of trial testimony	.7
4-17-79	Check Exhibits	1.0
4-18-79	Talk with George Taylor's family	.75
4-18-79	Read "Coping with Psych. Testimony" re cross of Carbone	.75
4-18-79	Review Carbone C.V.	.5
4-18-79	Finish prison and right to treatment case review	1.0

4-18-79	Review of S.B. 651 (Civil Commitment)	1.0
4-18-79	Summary of patient printout re Biggs	1.5
4-18-79	Phone call to Bonnie McBride (evening)	.75
4-18-79	Summarize phone call to Bonnie McBride	.10
4-19-79	Bonnie McBride testimony	.5
4-19-79	Review transcript KY case re MR's	.5
4-19-79	Talk with Harvey Grossman re evidence of harm to patients	.5
4-19-79	Talked with Dave Kuelker re George Taylor	.5
4-19-79	Seclusion reports review of summaries	.5
4-19-79	Visited National Youth Law Center, picked up Juvenile Justice Standards, discussed them with Adrienne Vokenick	1.5
4-19-79	Review Donald Tatum file—Biggs suicide	.5
4-19-79	Summary facts from Patient Printout	1.0
4-19-79	Review Bratkowski transcript depo	1.0
4-19-79	Review Tellez Transcript depo	1.0
4-20-79	Compile exhibits for Barclay to review	1.0
4-20-79	Telephone Steve Hulsey—patient	.5
4-20-79	Prepare Barclay testimony and inspection items	.5
4-20-79	Review Prop. Legal Issues & Factual Issues in Dispute	1.0
4-23-79	Research re evidence on Exhibit on Court record of Norman (Exhibit 846)	.5
4-23-79	Review photo exhibits	2.0
4-23-79	Talk to Judge McBride re transcript in Pryor and Evans; talked with Court Reporter	.5
4-23-79	Research drug "Ritalin" again	.5
4-23-79	DSM II on printout—census 3-30-79	2.0
4-23-79	Conclude summary of 279 plans	1.5
4-24-79	Pull files for Rundle, Barclay	1.0
4-24-79	Telephone to joint re records	.1
4-24-79	Talk to lawyers on case re inspection	1.0
4-24-79	Work on Stip. and Pre-trial 2	1.0

4-24-79	Travel to Columbia	2.1
4-24-79	Meet with experts	2.5
4-25-79	Meet with experts	.7
4-25-79	Meet with Steve Atkins	1.5
4-25-79	Meet with Ralph Taylor	1.5
4-25-79	Examine medical records	1.0
4-25-79	Work on use of medical records	1.0
4-25-79	Meet with experts—Fulton	2.0
4-25-79	Meet with Bonnie McBride—Columbia	3.0
4-25-79	Meet with Dr. Rundle	1.0
4-26-79	Meet with Rundle (a.m.)	.5
4-26-79	Meet with Rodney Norman	1.5
4-26-79	Examine medical records	1.0
4-26-79	Meet with Attorney General	4.0
4-26-79	Meet with Dr. Rundle and Attorney General (Boicourt)	2.0
4-26-79	Travel	2.0
4-27-79	Meet with Dr. Rundle	.5
4-27-79	Review notes from B. McBride, Ralph Taylor, Rodney Norman & Steve Atkins' medical records	4.0
4-27-79	Re-do testimony outline Barclay	2.0
4-27-79	Review medical records with Rundle	.5
4-27-79	Review Exhibits for use with witnesses	.5
4-27-79	Talk with attorneys in case	.5
4-27-79	Review medical records	.5
4-27-79	Prepare cross of defendants' witnesses	1.0
4-28-79	Work on cross of defendants' witnesses	2.0
4-28-79	Review stipulations for facts not in evidence yet	.5
4-28-79	PDR on Thorazine re George Taylor	.5
4-29-79	Jefferson City—Prepare Dr. Rundle	2.0
4-29-79	Review patient witness notes for Tuesday	1.5
4-30-79	First day of trial	10.5

4-30-79	Prepare for patient witnesses	2.0
5-1-79	2nd day of trial	7.0
5-1-79	Prepare Barclay 7:00-12	5.0
5-2-79	3rd day of trial—Barclay	8.0
5-2-79	Work on Thursday—B. McBride	3.0
5-3-79	4th day of trial—B. McBride and Frank Gilner	7.5
5-3-79	Prepare Rubin	1.0
5-3-79	Work on documents	1.0
5-4-79	5th day of trial—Dr. Rubin	7.0
5-5-79	Work at office for trial	2.0
5-6-79	Divide up witnesses for cross	3.0
5-7-79	Meet with Carlson	2.0
5-7-79	Work on cross of Bev. Wilson	1.0
5-7-79	Same for Guhlman	.5
5-7-79	Summarize trial notes	1.0
5-7-79	Review defendants' exhibits	2.0
5-7-79	Talk to expert	.5
5-6-79	Prepare for trial	3.0
5-7-79	Day 6 of Trial—Defendants' case	8.0
5-7-79	Prepare for Thursday	2.5
5-8-79	Trial	8.0
5-8-79	Preparation for Friday	2.5
5-9-79	Trial	7.0
5-10-79	Trial	7.0
5-11-79	Trial	7.0
5-11-79	Prepare for Monday—Brelje and Tuesday	2.0
5-12-79	Trial	6.0
5-12-79	Prepare for Dr. Carbone	3.0
5-14-79	Trial	8.0
5-15-79	Trial	7.0
5-16-79	Trial	7.0
5-16-79	Prepare for Glass	2.0

5-17-79	Trial	3.0
5-17-79	St. Louis—worked on organizing notes of trial for summaries and typing	1.5
5-18-79	Outlined my version of Post Trial Brief issues	1.0
5-18-79	Review trial notes	2.0
5-18-79	Review Brief in *Watkins* v. *Davis*	2.0
5-19-79	Review trial notes	2.0
5-21-79	Review notes—review legal cases, standards, exhibits, brief. Work on rough draft of Post Trial Briefs	8.0
5-22-79	Brief	8.0
5-23-79	Brief	8.0
5-24-79	Brief	8.0
5-25-79	Brief	8.0
5-28-79	(Memorial Day) Brief	2.0
5-29-79	2nd draft of Brief (Brief due May 31)	8.0
5-30-79	Brief	6.0
5-31-79	Brief	2.0
6-5-79	Reply Brief—review transcripts	2.0
6-6-79	Reply	2.0
6-7-79	Reply Brief	2.5
10-19-79	Conference with Mr. Berkowitz, and Dr. Gilner regarding State's Plan	1.5
11-1-79	Review defendants' plans for remedy—talk to Dr. Rundle	8.0
11-2-79	Drive to Jefferson City; talk with Boicourt and Arnett; review our position for meeting next day	8.0
11-3-79	Meeting with State and with Court re remedy—drive back	4.0
11-5-79	Talk to Dr. Rundle, Dr. Brelje, Dr. Shine at Central N.Y. State Hospital re treatment planning	3.0
	TOTAL:	524.6 HRS.

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

AFFIDAVIT OF RONALD L. CARLSON IN SUPPORT OF PLAINTIFFS' REQUEST FOR ATTORNEYS FEES

I, Ronald L. Carlson, being first duly sworn, state as follows:

1. I am one of the attorneys for the plaintiffs in the above-entitled case. I make this affidavit in support of plaintiffs' request for an award for attorneys' fees.

2. I have received two degrees in law. In 1961 I was awarded the Master of Laws degree by Georgetown University Law Center. Prior thereto, in June of 1959, I received my J.D. degree from Northwestern University School of Law. My litigation experience includes trials in the District of Columbia, in Illinois, and in Iowa. I have orally argued appeals before the Supreme Court of United States, the United States Court of Appeals for the Eighth Circuit, and the United States Court of Appeals for the First Circuit, and before the Supreme Court of Iowa.

3. After completing my Master of Laws work as an E. Barrett Prettyman Fellow in Trial Advocacy at Georgetown, I returned to practice in my home state, Iowa. I specialized in litigation as an attorney in a twelve member law firm. During that time I was named United States

Commissioner for the Southern District of Iowa, Eastern Division, on appointment by the Honorable Roy Stephensn. At the time, Judge Stephenson was serving as a United States District Judge. I served as Commissioner until I was appointed to the faculty at the University of Iowa College of Law. Later, I testified before the United States Senate Judiciary Committee, Judicial Machinery Subcommittee, in the hearings which led to passage of legislation changing from a Commissioner to a United States Magistrate system. Hearings, July 11, 1966, pp. 150-55.

4. In September 1965 I began teaching law at the University of Iowa. Later that year, the Supreme Court of the United States appointed me to argue the case of Lawrence Long before the high court. The resulting Supreme Court decision, *Long v. District Court,* 385 U.S. 192 (1966), established the right of indigent state prisoners to habeas corpus transcripts. A later United States Supreme Court case which I argued raised the question of whether a state's alibi procedure gave defendants their presumption of innocence in criminal cases. I argued this case, *Johnson v. Bennett,* before the Supreme Court and in the Eighth Circuit. On remand from the Supreme Court, the Eighth Circuit sitting en banc struck down the state alibi procedure as violative of due process. *Johnson v. Bennett,* 414 F.2d 50 (opinion by Blackmun, J.), on remand from 393 U.S. 253.

5. Other cases which I have argued include *Escute v. Delgado,* 282 F.2d 335; *Pries v. MFA Mutual Insurance Co.,* 255 Iowa 442, 122 N.W. 2d 925; and *Bandag, Inc. v. Morenings,* 259 Iowa 998, 146 N.W. 2d 916. I have been admitted to practice before the United States Supreme Court, United States Court of Appeals for the District of Columbia Circuit, United States Court of Appeals for the First Circuit, United States Court of Appeals for the Eighth

Circuit, United States District Court for the Southern District of Iowa, United States District Court for the District of Columbia, and before the Trial and Appellate Courts in Iowa and Illinois.

6. When the Federal Rules of Evidence were before Congress, my views on trial evidence were cited during congressional action. See Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary (Hungate Committee), House of Representatives 93rd Congress, First Sess. on Proposed Rules of Evidence 27, 190, 389-392 (1973). When the federal evidence rules reached the house floor, my views were again cited. The congressional record, 93rd Congrss, Second Sess., p.H548 (Feb. 6, 1974). In court decisions this has been the case as well. See *United States v. Smith,* 520 F.2d 1245 (8th Cir. 1975); *McDonnell v. United States,* 472 F.2d 1153 (8th Cir. 1973); *United States v. Guajardo-Melendez,* 401 F.2d 35, 38 note 5 (7th Cir. 1968). My approach to trial problems such as cross-examination appears in leading texts. See, e.g., McCormick, Evidence 53-54.

7. In 1973 I joined the law faculty of Washington University in St. Louis. I teach evidence and trial practice, and continue active professional involvement in the trial field. This includes lecturing widely to trial lawyers across the country on trial tactics and trial proof. As a member of the Continuing Education Board of the Federal Bar Association, I have appeared on numerous programs for practicioners in federal trials. For example, in September 1979 I am lecturing the lawyers attending the National Convention of the Federal Bar Association on the subject of Hearsay and Privileges in Federal Trials. Further, I am on the faculty of the American Academy of Judicial Education and have presented numerous programs for

trial judges on the subjects of cross-examination, expert witnesses, hearsay, and privileges.

8. In the appendix attached to this affidavit I have set forth a list of hours I have spent working on this case. My time record includes no claim for work performed by legal assistants. The appendix includes time spent on the case up to the present. Any further work will be reported when appropriate.

I have read the above statement and it is true and correct to the best of my information and belief.

SIGNATURES OMITTED IN PRINTING

APPENDIX A

ECKERHART V. HENSLEY

Attorney Time Of Ronald L. Carlson

Date	*Activity*	*Time*
9-8-76	Conference with Mr. Lander and Mr. Hyde at the Legal Aid Office	2.0
9-10-76	Pleading and File Review	
9-22-76		
9-26-76		3.0
9-27-76	Conference at Legal Aid Office with Mr. Wilderson and Mr. Hyde; detailed oral review by consultant of Bratkowski deposition	1.5
10-4-76	Conference with Mr. Wilderson at Washington University re: Evidentiary aspects of proving up charts of treatment plans	.75
10-11-76	Study of Jacks deposition	1.5
10-12-76	Conference with Mr. Lander; Conference with Mr. Hyde at Legal Aid Office, review of discovery and of Jacks deposition	1.5
10-18-76	Review of Maylee depositions and study of Brelje report	2.25
10-19-76	Conference with Mr. Hyde at Legal Aid Office re: Maylee deposition, discovery letter	1.25
10-28-76	Conference with Mr. Wilderson and Professor Haworth at Professor's office in Law School re: *Barnes* pleadings and the filing of substituted pleadings	1.5
11-2-76	Conference with Mr. Hyde at Legal Aid Office	1.0
11-10-76	Telephone Conference with Mr. Hyde	.25
11-12-76	Conference with Mr. Hyde and Mr. Wilderson at Legal Air Office	1.5
12-9-76	Conference with Mr. Hyde at his office	1.5
12-15-76	Research and preparation of memorandum re: "Presumption of Continuation in Federal courts" for Mr. Hyde	1.5

12-16-76	Review of Jacks reconvened deposition	1.5
12-17-76	Meeting with Professor Newburger and Hyde re: trial problems in treatment suits	1.0
12-20-76	Review of amended Complaint	.5
1-5-77	Telephone conference with Mr. Hyde re: pre-trial order #1	.25
1-5-77	Review and preparation of suggested amendments to pre-trial order #1	1.5
1-6-77	Detailed discussion of suggested amendments to pre-trial order #1 by telephone with Mr. Hyde	.75
1-14-77	Telephone Conference with Mr. Hyde	.25
1-17-77	Pre-trial hearing with Mr. Hyde, Assistant Attorney General, Judge Hunter and Judge Ralston; post-hearing conference with Assistant Attorney General; post-hearing conference with Mr. Hyde; travel to & from Jeff. City	7.0
2-9-77	Telephone conference with Mr. Hyde	1.0
2-17-77	Conference at Washington University with Mr. Hyde and Mr. Wilderson: review and signing of brief in support of Motion for Leave to File Amended Complaint; review and discussion of amended complaint	1.0
2-24-77	Telephone conference with Mr. Hyde	.5
3-3-77	Meeting with Mr. Hyde at Legal Aid Office	1.25
3-9-77	Telephone conference with Mr. Hyde; office review of Attorney General resistance to amended complaint	1.25
3-22-77	Telephone conference with Mr. Hyde	.25
3-24-77	Lunch conference with Mr. Hyde, Mr. Wilderson, Attorney R. Newman; re: Trial Evidence Experts	1.0
4-6-77	Telephone conference with Mr. Hyde	.25
4-8-77	Office conference at Legal Aid Office with Mr. Hyde re: Motions, trial evidence, and consent decree	2.0
4-20-77	Telephone conference with Mr. Hyde	.25

4-25-77	Telephone conference with Mr. Hyde	.25
5-9-77	Completion of Pro Hac Vice Motion; telephone conference with Mr. Hyde	.5
5-11-77	Luncheon conference; regarding pre-trial hearing with Mr. Wilderson and Mr. Hyde	1.5
5-12-77	Pre-trial conference in Jefferson City with Judge Ralston; conference with Deputy Attorney General in his office; post-trial conference with Mr Hyde and Mr. Wilderson; travel to & from Jeff. City	7.0
5-13-77	Telephone conversation with Mr. Hyde regarding excluding individual defendants from attorney fee judgment	.25
5-19-77	Office conference at Legal Aid Office with Mr. Hyde	1.25
6-78 thru 6-79	Review of Proposed Settlement and Consent Agreement submitted to Assistant General; Consultation re: Plaintiffs' Exhibits and wording of stipulations re exhibits; Consultation re impeachment of own witnesses called by plaintiff and review of federal rules 701-705 on opinion evidence; luncheon conference re plaintiffs' proposed answers to interrogatories; discussion of preparation of summaries of treatment plans; review of amended complaint; review of depositions, and review of reports of inspection of Fulton Hospital by defendants' experts	17.0
1-19-79	Travel to Jefferson City with Mr. Berkowitz for meeting with U.S. Magistrate and discussion of case	8.0
1-24-79	Meeting with Mr. Berkowitz and Mr. Hyde	1.0
3-20-79	Meeting with Mr. Berkowitz and Mr. Bastian at Legal Aid Office	1.5
3-22-79	Review of Albert Glass file	1.0
3-26-79	Receipt and review of five memoranda from Mr. Bastian re Evidence questions on opinion testimony from lay witnesses, patient testimony, admissions by staff members, etc.; research of evidence law	2.0

4-12-79	Conference at Legal Aid Office with Mr. Berkowitz, Mr. Hyde and Mr. Bastian; answers to inquiries previously submitted by Mr. Bastian	2.0
4-19-79	Conference with Dr. Gilner, review of Schaeffer file	4.0
4-29-79	Travel to Jefferson City	2.0
4-29-79	Trial preparation: Team Conference	2.0
4-30-79	Trial: Court appearance; Rundle testimony	10.5 (Court Day)
5-1-79	Conference with Robert Atkins at 8:30 a.m.; Court appearance; presentation of Mr. Atkins; presentation to court of records of St. Louis Court, including letter by Mr. Morrow	7.0 (Court Day)
5-2-79	Court appearance, consultation and research re therapy records and right to have produced	8.0 (Court Day)
5-3-79	Court appearance; presentation to court of request for patient records of David	7.5 (Court Day)
5-3-79	Conference with Dr. Rubin, Dr. Gilner—trial team	3.0
5-4-79	Court 9:30-11:45 a.m., 2:30-4:30 p.m., presentation of interrogatory answers to court; conference re proof	7.0 (Court Day)
5-4-79	Travel to St. Louis	2.0
5-7-79	Conference at Legal Aid Office, Mr. Berkowitz, location of writings of Dr. Rappaport; library trace; survey of medication policies	3.0
5-8-79	Conference with Mr. Berkowitz; preparation of Glass and Schaeffer cross-exams	1.0
5-9-79	Travel to Jefferson City	2.0
5-10-79	Court Date; Trial	7.0 (Court Day)

5-11-79	Court Date; Trial	7.0 (Court Day)
5-11-79	Preparation conference, prepared cross-examination of Dr. Rappaport with Mr. Berkowitz	2.0
5-12-79	Court Date	6.0 (Court Day)
5-12-79	Travel from Court to St. Louis	2.0
5-14-79	Travel—St. Louis to Court	2.0
5-14-79	Court Date	8.0 (Court Day)
5-14-79	Conference with Mr. Hyde; preparation of Schaeffer cross-exam	4.0
5-15-79	Preparation of Schaeffer cross-examination; assembly of materials; review of Schaeffer reports; conference with Mr. Bastian, Mr. Berkowitz, Mr. Hyde	4.0
5-15-79	Court Day	7.0
5-16-79	Court Day	7.0
5-16-79	Preparation of Glass cross-examination; review of report; assembly of materials; conference with Mr. Bastian, Mr. Berkowitz and Mr. Hyde	5.0
5-17-79	Court 8:30-11:30 a.m.	3.0 (½ Court Day)
5-17-79	Travel: Court to St. Louis with Mr. Berkowitz	2.5
5-19-79	Conference with Mr. Hyde; review of trial testimony for briefs	2.0
8-14-79	Review of decision with Legal Aid Staff	2.0
	TOTAL:	214.75 HRS

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING

PLAINTIFFS' AMENDED REQUEST FOR ATTORNEYS' FEES

Plaintiffs amend herein their motion for reasonable attorneys' fees by requesting that the fee be enhanced by an appropriate percentage (e.g. 30%-50%) with interest from the filing date of April 27, 1972.

The grounds in support of this amendment are contained in Senior District Judge Becker's decision in *Cleverly v. Western Electric Co.*, 450 F.Supp. 507 (W.D.Mo., 1978), *aff'd*, 594 F.2d 638 (8th Cir., 1979).

In *Cleverly* Judge Becker first determined a "minimum fee" consisting of the number of hours spent by plaintiffs' counsel multiplied by the value of those services. The minimum fee was then adjusted by consideration of the remaining factors referenced in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir., 1974). Interest was added from the date of filing.

The Eighth Circuit in *Cleverly* characterized this approach as a "model of clarity, which should serve as an example for the proper computation of attorneys' fees awards in cases of this type." 594 F.2d at 642.

The factors in support of the enhancement sought herein have already been discussed in our memorandum.

Wherefore, plaintiff requests that their fee be enhanced by an appropriate percentage with interest from the date of filing.

SIGNATURES OMITTED IN PRINTING

CERTIFICATE OMITTED IN PRINTING

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

FILED JUNE 2, 1980

TITLE OMITTED IN PRINTING

ORDER REQUIRING SUBMISSION OF SUPPLEMENTAL REMEDIAL PROPOSAL

On August 11, 1979, after full trial, this Court held that the plaintiff class of mental patients involuntarily confined in the Forensic Unit, Fulton State Hospital, have a constitutional right to treatment under the due process clause of the fourteenth amendment and that minimally adequate treatment includes a humane physical and psychological environment, sufficient numbers of qualified staff, and an individualized treatment plan for each patient. The Court found certain conditions, policies and practices in the Forensic Unit to be in violation of that constitutional right, specifically:

1. Climatic conditions in the Biggs Building;
2. Lack of privacy in lavatories and bathrooms;
3. Dormitory sleeping arrangements;
4. Lack of furnishings and availability of personal belongings;
5. Delay in preparation of treatment plans and lack of regular review thereof;

6. Delayed transfer to a less restrictive environment after a determination that a patient was no longer in need of maximum security confinement;

7. Inadequate provision for visitation and telephone use;

8. Inadequate procedural protections regarding the use of seclusion and physical restraints.

Defendants have submitted to the Court the following proposal to remedy the constitutional defects noted above.

1. Climatic conditions in the Biggs Building

Defendants advise that an appropriate of $986,000 is now available for the first two phases of a three phase heating and airconditioning project for the Biggs Building. Phase I of the project, now in construction, includes a mechanical equipment room, one 200 ton chiller, and installation of the new heating and airconditioning system on eight patient wards. Phase II will include installation of a second 200 ton chiller and extension of the heating and airconditioning system to two additional patient wards. Defendants estimate that Phases I and II will be completed in March, 1981.

An additional appropriation has been requested to complete Phase III of the project, which will extend the system to the remaining patient ward (the pretrial admissions ward), therapy areas, treatment areas, the kitchen and dining areas, the recreation area, and administrative areas. Defendants estimate that Phase III will require an additional appropriation of $950,600.

Defendants advise that an appropriation of $1,251,000 has been made for renovation of the Biggs Building and that replacement of windows and security screens is to be given priority. Defendants' estimated date of completion

of the renovation project within the limits of the current appropriation is June, 1981.

2. Lavatories and bathrooms

The Biggs Building renovation project mentioned above, for which money has already been appropriated, includes the "remodeling of toilet facilities to provide increased privacy, improved ventilation, and facilities for the handicapped." Defendants' proposal states that the remodeling of toilet facilities will be a priority item in the project. The project will be completed within the limits of new available funds by June, 1981.

3. Sleeping dormitories

The Biggs Building renovation project also includes the partition of the existing sleeping dormitories in seven wards into individual rooms; defendants state that this also is to be a priority item. The entire project is to be completed, within the limits of now available funds, by June, 1981.

4. Furnishings and personal belongings

Defendants advise that an appropriation of $158,000 has been requested to provide furnishings for individual patient rooms in the Biggs Building. Defendants propose that the individual rooms be furnished with a combination desk, bureau and bookshelf, a chair, and a new bed and mattress. Defendants also propose to decorate those rooms occupied by patients for whom there are no contraindications with posters, wall hangings and murals, and throw rugs. Defendants' proposal does not contain an estimated completion date for the furniture and decorating project.

5. Individual treatment plans

To remedy the deficiencies noted by the Court regarding treatment plans, specifically the delay in preparation

of initial plans and lack of regular review, defendants propose a three-step procedure resulting in a goal-oriented treatment plan for each patient. Defendants propose that a temporary treatment plan be prepared for each patient within five working days of admission. A review of the form to be used for this plan appended to defendants' proposal reveals that this initial plan of treatment is essentially an admissions checklist detailing the various examinations and consultations to be performed on each new admission.

Defendants propose that the initial treatment plan be followed within fourteen working days with an intermediate treatment plan, to be signed by two mental health professionals, which includes notation that initial testing and evaluation has been completed, clinical diagnosis, program and treatment referrals, and lists of identified problems and strengths.

The goal-oriented treatment plan is to follow the intermediate plan within ten working days. This plan is to include identification of treatment goals for the individual patient, staff assignments for each goal, and target and achievement dates. This plan identified the physician responsible for the patient and is prepared and signed by two mental health professionals. Defendants propose that the goal oriented treatment plans be formally reviewed every 90 days. A Building Monitor is to assure compliance with the plan development timetable and the review schedule and to remind treatment program staff of approaching deadlines.

Plaintiffs object to two aspects of defendants' proposal. The initial and intermediate "treatment plans" in defendants' procedure are not treatment plans at all, say plaintiffs, but merely medical checklists. Plaintiffs also

complain of the 90 day review periods as being far too long and suggest a 30 day review period.

The Court accepts defendants' proposal and timetables to insure prompt preparation and regular review of individual treatment plans as a bare constitutional minimum. Of special concern to the Court is the possibility that, even under defendants' proposal, preparation of a goal-oriented treatment plan could be delayed five or six weeks after admission.

6. Least restrictive environment

Defendants state that the lists of patients approved for transfer from the Biggs Building to the Rehabilitation Unit has been reduced to zero. To prevent delay in transfer from the Forensic Unit to *other* less restrictive facilities, defendants propose that once the treatment team decides a patient is ready for transfer to a less restrictive environment, a summary of information shall be submitted to either the Director of the Division of Comprehensive Psychiatric Services or his designee (in the case of mentally ill patients) or the Director of the Division of Mental Retardation and Developmental Disabilities (in the case of mentally retarded patients). After a review period not to exceed ten days, if the transfer of a mentally ill patient is approved, the summary shall be sent to the transferee facility and a transfer shall be arranged within two weeks. In the case of a mentally retarded patient, after a review period not to exceed ten days, the summary shall be forwarded to the appropriate Regional Diagnostic Center, which shall evaluate the patient within two weeks. If the Center concurs in a diagnosis of mental retardation, the patient will be placed in accordance with departmental procedures for placement of the mentally retarded. If the Center does not diagnose the patient as mentally retarded, the patients' summary shall be returned to the Director of

the Division of Mental Retardation and Developmental Disabilities who is to make a decision regarding placement with the Director of Comprehensive Psychiatric Services.

The Court notes that defendants' proposal does not include a specific timetable for the transfer to a less restrictive facility of mentally retarded patients who have been approved for transfer from maximum security confinement. The Court also notes that defendants' proposal directly concerns the elimination of delay in the transfer of patients from the Forensic Unit to *other* facilities with less restrictive environments. The orderly and timely transfer of patients from the Forensic Unit to other facilities will certainly have an impact on any delay in intra-Forensic Unit transfers of patients from the Biggs Building to the Rehabilitation Unit due to insufficient space in the Rehabilitation Unit or due to a lack of other facilities within the Forensic Unit for treatment in a less than maximum security setting. However, defendants' proposal does not directly address the principal deficiency in this area, which is the historical pattern of long delay from a determination of patient eligibility for transfer to actual transfer out of the maximum security Biggs Building to the Rehabilitation Unit or other less restrictive facility.

7. Visitation and telephone use

Defendants propose to retain the present visiting room for use by patients who might require more structure and greater security arrangements during visiting periods. This visiting room is to be remodeled as a part of the Biggs Building renovation project referred to above. Defendants also propose the construction of an additional new visiting room located across the hall from the present room, approximately 480 square feet in size, to be used for less structured visitation. This room will contain ten canteen-

type tables and forty chairs and coin-operated soft drink and candy machines. The estimated date of completion for the renovation project is June, 1981. In the interim, defendants propose that the room now containing the library be used as a temporary additional visiting room. This room would contain six canteen-type tables and twenty-four chairs. Visiting hours are to be extended to 9:00-11:15 a.m., weekends and holiday; 1:00-2:40 p.m., seven days per week; 7:00-8:00 p.m., Monday, Tuesday and Saturday.

Defendants propose to lower the age limit for visits during visiting hours in the visiting rooms by children from fifteen years to ten years. Visits by children under ten years are to be by appointment only and scheduled for the hours of 9:00-11:15 a.m., Monday through Friday, and 7:00-8:00 p.m., Monday and Tuesday. These visits are to be in a separate room with an aide present and are to last no more than thirty minutes.

Any restriction on visiting regarding either patient or visitor is to be by doctor's order and shall state the length of time such restriction is to apply.

Plaintiffs object to any across-the-board restriction on visits by young children. Plaintiffs point out that defendants' proposal for visits by children under ten years does not allow for appointments to be made on weekends and argue that such restrictions discourage visitation and are countertherapeutic.

Defendants propose to install a public telephone on each floor of the Biggs Building which will be activated only during scheduled hours: 9:00-11:00 a.m., 1:00-2:30 p.m., 7:00-800 p.m. The telephones will not be equipped to take coins, so patients will be able to make long-distance calls collect or to charge calls to a third number. Patients are to request each call in advance and be placed on a tele-

phone schedule. Each patient is to be allowed one five minute telephone call per day. All incoming calls will pass through the main switchboard. The patient will be notified that he has received a call and will be able to return the call at the next scheduled telephone period. Any restriction on telephone use shall be by doctor's order and shall state the reason and the length of time the restriction is to be in effect.

8. Seclusion and restraint

In its Opinion, this Court found that the safeguards contained in defendants' existing policy regarding a medical decision to use seclusion or restraints were not adequately carried into practice to afford patients minimal due process. To remedy this deficiency, defendants propose to issue specific guidelines to ward personnel regarding the documentation necessary to insure compliance with the Forensic Unit policy. Defendants also advise that the use of seclusion and restraints will be a part of aide training programs, as it has been in the past. A monthly review and teaching session will be held at hospital-wide physicians' meetings to update doctors on regulations and necessary documentation. The Seclusion and Restraint Committee will continue to operate to review the use of seclusion and restraints in the Biggs Building.

With respect to seclusion used for disciplinary purposes, defendants propose to institute a hearing procedure compatible with the holding in Wolff v. McDonnell, 418 U.S. 539 (1974), which includes written notice of violation 24 hours prior to hearing, hearing before three persons designated by the Director (not to include the person who charged the patient with a violation of institution rules), and a written statement by the factfinder of evidence relied upon and reasons for disciplinary action.

After careful consideration of defendants' proposal and plaintiffs' response and objections thereto, the Court concludes that the proposal is insufficient, in several rather minor aspects, to remedy certain of the constitutional deficiencies in the Forensic Unit. Accordingly, defendants are directed to submit a supplemental proposal to remedy deficiencies in the areas noted below.

1. Defendants are directed to submit a procedure which includes a *specific timetable for the transfer of mentally retarded patients* approved for transfer from the Forensic Unit to a less restrictive facility and which also includes *a specific timetable for transfer of patients approved for transfer from the maximum security Biggs Building to the Rehabilitation Unit* or other less restrictive facility.

2. Defendants are directed to submit a supplemental proposal for visitation and telephone use which would provide for *visits by appointment for children under ten years of age during holidays and weekends* and which specifies the manner in which patients *may make local telephone calls* and which provides for a *more flexible telephone use policy* which would allow for more than one five minute outgoing call per day if actual demand for telephone use leaves facilities free.

Defendants supplemental proposal shall be filed and served upon plaintiffs within 20 days of the date of this Order. Entry of a final injunctive order shall await the submission of defendants' supplemental proposal.

IT IS SO ORDERED.

ELMO B. HUNTER
6/2/80: UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

TITLE OMITTED IN PRINTING } **Notice of Appeal**

Notice is hereby given that C. Duane Hensley,* James K. Ritterbusch, Henry Bratkowski, Edward Tellez, and the current members of the Missouri Mental Health Commission, defendants in the above-referenced legal proceeding, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Memorandum and Order respecting the award of attorneys' fees and the taxing of costs entered in this action by the Honorable Elmo B. Hunter on the 23rd day of January, 1981.

March 31, 1981.

SIGNATURES OMITTED IN PRINTING

* Dr. Hensley has been succeeded in the office of Director, Missouri Department of Mental Health by Dr. Paul Ahr.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

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February 18, 1981.

SIGNATURES OMITTED IN PRINTING

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Opposition

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1244

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,

Petitioners,

vs.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

STATEMENT OF THE CASE

This lawsuit was originally filed in April, 1972. Early in the litigation, several important issues were settled *via* a consent decree filed December 3, 1973. In the decree, defendants agre[illegible] *inter alia,* to provide due process hearings in connection with the placement of patients in the Biggs Building. The con-

sent decree resolved Count II of the Complaint with essentially all the relief sought in that count.

Shortly thereafter defendants agreed to compensate patients for institution-maintaining labor as then required by the Fair Labor Standards Act. The Court's order of August 2, 1974, noted that defendants took this action, at least in part, in response to plaintiffs' request for a preliminary injunction. Defendants' changed policy on institution-maintaining labor brought about much of the relief sought in Count III of the original complaint.[1]

In January, 1975, the Missouri Department of Mental Health (DMH) adopted Operating Regulation No. 149, which required that a written individualized treatment plan be prepared for each patient within five days after admission. *Eckerhart* v. *Hensley,* 475 F. Supp. 908, 921 (W.D. Mo. 1979).

Upon the Court's request, plaintiffs' original complaint *Barnes* v. *Hill,* No. 1821, was voluntarily dismissed. In its place *Barnes* v. *Robb,* No. 75 CV 87-C was filed in April, 1975. The vast majority of orders, memoranda and discovery material was adopted by the Court. Certified Docket Entries (hereinafter "Entries") at 2.

In September 1977, defendants abandoned certain challenged mail policies. For example, incoming mail from courts, officials, and lawyers could no longer be opened outside the presence of the patient. Outgoing mail, which was formerly read and censored, could not be sealed by the patient and not screened in any way. *Id.,* at 924.

Additionally, the size of the treatment staff in the Biggs Building markedly increased during the course of the litigation.

---

[1] Subsequently plaintiffs voluntarily dismissed Count III of *Barnes* v. *Robb,* thus dropping their compensation claim for past institution-maintaining labor performed by patients.

For example, the number of full-time psychologists increased from 2[2] to 5[3], and full-time nurses increased from 1[4] to 4[5].

As a result of the above, plaintiffs had achieved significant relief prior to trial on the merits.

The trial commenced on April 30, 1979 and lasted approximately three weeks, *Entries* at 10-11. The Court's decision on the substantive issues, reported at 475 F.Supp. 109 (W.D. Mo. 1979), was issued August 11, 1979.

The Court first addressed the critical issue of whether non-criminally comitted mental patients confined to a maximum security mental institution have a constitutional right to receive treatment. The Court rejected defendants' arguments against the existence of that right and found in favor of a constitutional right to treatment for the Forensic Unit residents. *Id.* at 914. The Court also adopted the position of plaintiffs that the essential elements of constitutionally adequate treatment included individualized treatment plans, sufficient numbers of qualified staff and a humane and therapeutic environment. *Id.* at 915.

In its substantive opinion, the Court separately discussed six categories of specific issues raised by plaintiffs.

(1) **Physical Environment:** The Court found that the following areas were not minimally adequate to provide patients in the Biggs Building the constitutionally required treatment environment: (a) inadequate climate control; (b) inadequate lavatories and bathrooms; (c) inadequate sleeping facilities; and (d) inadequate furnishings and space for individual belongings. *Id.* at 916-919.

---

[2] Deposition of Dr. Bratowski taken on November 17, 1976, at 13.

[3] Joint Stipulation of Fact, (hereinafter "Jt. Stip.") filed April 27, 1979, at 21.

[4] Bratowski deposition, *supra* at 12.

[5]. Jt. Stip., *supra* at 17.

(2) **Staff:** By the time of the trial the size of the treatment staff was found to be minimally adequate. *Id.* at 920.

(3) **Individual Treatment Plans:** Defendants' delay both in the initial preparation of the plans and the length of time between treatment plan reviews was held to violate the rights of patients. *Id.* at 922.

(4) **Least Restrictive Environment:** The Court found that there was typically a substantial delay between the determination that a patient in Biggs was ready for transfer to the less restrictive Rehabilitation Unit and when the transfer actually occurs. That delay was found by the Court to be inconsistent with due process. *Id.*

(5) **Visitation, Telephone and Mail:** Defendants' visitation and telephone policies were found to be so overly restrictive as to constitute punishment and therefore violative of patients' constitutional rights. The mail policy, as existing at the time of trial, was upheld. *Id.* at 925.

(6) **Seclusion and Restraint:** The safeguards of defendants' policies regarding medical decisions to use seclusion or restraint were found by the court to be not adequately carried into practice to afford the patients minimal due process. The court also held that the use of seclusion as discipline required the use of *Wolff* v. *McDonnell* procedures. Since no such procedure was available to the patients, the court concluded that defendants' practices were a violation of patients' rights. *Id.* at 926-28. The decision did not find that the patients were over-medicated. *Id.* at 925-6.

In February, 1980, plaintiffs filed their request for attorneys' fees. Throughout the lawsuit plaintiffs have been represented by Legal Services of Eastern Missouri (hereinafter LSEM), a non-profit legal aid organization. The bulk of the representation was conducted by three LSEM attorneys—Stuart R. Berkowitz, Michael Bastian and William A. Hyde. Professor Ronald

Carlson, of Washington University also participated in plaintiffs' representation. Appendix B at 4.

Based upon their work in preparing and trying the lawsuit, plaintiffs requested an award of $150,477.85.[6] (Plaintiffs did not request compensation for any time devoted to work prior to 1975, or for other LSEM staff attorneys, paralegals, law clerks or other support staff who also contributed time to the cases. Appendix B, at 5.)

Also accompanying the attorney's request was plaintiffs' motion to tax costs in the amount of $15,177.40[7]. Appendix B at 5.

On October 16, 1980, the Court held a hearing on attorneys' fees. Although defendants' offered several exhibits containing financial information on LSEM's budget and counsels' salaries, the evidence did not demonstrate that "the cost to LSEM of providing representation" amounted to $25.00 per hour, nor was there any finding of fact by the Court to that effect. It issued its memorandum and order, awarding plaintiffs attorneys' fees in the amount of $133,332.25 and costs in the amount of $15,177.40, on January 23, 1981.

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[6] The requested award is broken down as follows:

Attorney	Hours	Rate Per Hour	Total
Mr. Berkowitz	817.50	$65.00	$53,137.50
Prof. Carlson	214.75	$65.00	$13,958.75
Mr. Bastian	524.60	$50.00	$26,230.00
Mr. Hyde	1428.79	$40.00	$57,151.60

[7] The following is a summary of the taxing costs against defendants:

Item	Amount
Travel, meal and lodging expenses of counsel	$ 5,510.18
Expert fees and expenses	$ 6,608.29
Taxable costs (depositions xeroxing, and witness fees)	$ 2,859.03

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Question Presented In The Petition.

A. The decision does not present the proportionality issue because plaintiffs obtained relief on all of their material claims.

Plaintiffs prevailed, either by obtaining court-ordered relief, or by causing the defendants to remedy complained of conditions (thereby obviating the need for court-ordered relief) on virtually every material claim of the lawsuit. A presentation of the proportionality issue presupposes that a party fails to obtain any relief on one or more material claims. Since plaintiffs did obtain relief on each of their material claims, petitioner's sole issue of proportionality is not presented by this lawsuit.

As this Court has held in several cases, the legislative history of the Civil Rights Attorney's Fees Act of 1976 (hereinafter § 1988) explicitly indicates that a person can be a prevailing party without having obtained a favorable final judgment following a full trial on the merits. *Maher* v. *Gagne*, ____ U.S. ____, 100 S.Ct. 2570-2575 (1980) and *Hanrahan* v. *Hampton*, ____ U.S. ____, 100 S.Ct. 1987, 1989 (1980). "Thus for example, 'parties may be considered to have prevailed when they vidicate rights through a consent judgment or *without formally obtaining relief*.' " [emphasis added] [citations omitted]. *id.* at 2575.

The following discussion will examine each of the areas to demonstrate what specific relief was obtained by plaintiffs. The District Court summarized those areas in which it ordered relief in its "Order Requiring Submission of Supplemental Remedial Proposal", dated June 2, 1980. Judge Hunter stated:

> The Court found certain conditions, policies, and practices in the Forensic Unit to be in violation of that constitutional right [to treatment], specifically:

(1). Climatic conditions in the Biggs Building;

(2). Lack of privacy in lavatories and bathrooms;

(3). Dormitory sleeping arrangements;

(4). Lack of furnishings and availability of personal belongings;

(5). Delay in preparation of treatment plans and lack of regular review thereof;

(6). Delayed transfer to a less restrictive environment after a determination that a patient was no longer in need of maximum security confinement;

(7). Inadequate provision for visitation and telephone use;

(8). Inadequate procedural protections regarding the use of seclusion and physical restraints.[8]

Of the six categories of issues addressed by the District Court in its substantive decision,[9] the only one in which the Court did not award any relief was staffing. It was that area, however, in which defendants made such material improvements in response to plaintiffs' suit that court-ordered relief was unnecessary.

---

[8] Items 1-4 were discussed in the Court's opinion under the heading, "Physical Environment", *Eckerhart* v. *Hensley*, 475, F. Supp. 908, 916-919. Item 5 was discussed under the heading, "Individual Treatment Plan", *id.* at 921-2. Item 6 was discussed under the heading, "Least Restrictive Environment", *id.* at 922-3. Item 7 was discussed under the heading, "Visitation, Telephone and Mail", *id.* at 923-5. Item 8 was discussed under the heading, "Seclusion and Restraints", *id.* at 925-8.

[9] A. Physical Environment B. Staffing C. Individual Treatment Plans D. Least Restrictive Environment E. Visitation, Telephone and Mail, and F. Seclusion and Restraints, *id.* at 916-28.

1. Staffing

Staffing levels underwent significant increases during the course of the litigation. For example, the number of full-time psychologists in the Biggs Building increased from 2[10] to 5[11] and full-time nurses increased from 1[12] to 4[13]. Thus by the time of trial, the Court found that the staffing levels were not constitutionally insufficient. *Eckerhart, supra* at 920.

Defendants' own testimony establishes the relationship between the litigation and defendants' remedial actions. During the cross-examination of Dr. James K. Ritterbush, Superintendent of Fulton State Hospital, plaintiffs' counsel examined the witness about the most recent funding request for the hospital.[14]

Q: Doctor, under objectives it states:

> . . . 'The Forensic Unit is at present involved in defending a class action lawsuit from the Legal Aid Society of St. Louis. To successfully defend this lawsuit, the Attorney General has advised us that we must completely implement these individual treatment plans as soon as possible. These additional personnel and clerical staff and equipment used for their support are necessary to meet this demand.'
>
> Do you recall that statement, Doctor?

A: Yes, Sir.

---

[10] Deposition of Dr. Bratowski taken on November 17, 1976, at 13.

[11] Joint Stipulation of Fact (hereinafter "Jt. Stip.") filed April 27, 1979, at 21.

[12] Bratowksi, deposition, *supra* at 12.

[13] Jt. Stip., *supra* at 17. These figures are actually more significant in the context of the fact that the resident population significantly decreased during this same time period.

[14] Plaintiffs' Exhibit 793.

Q: That Statement was contained in the budget request, was it not?

A: Yes, Sir.

Q: And, you asked for this additional personnel in the context of this lawsuit, did you not?

A: Yes, Sir.

Ritterbush cross-examination, a 31-33.

Defendants' testimony plainly reveals the key role which the suit played in causing defendants to increase the staffing at Fulton State Hospital.

2. Individual Treatment Plans

Plaintiffs' lawsuit challenged defendants' failure to use individual treatment plans. In January 1975, after commencement of the lawsuit, defendants adopted a policy requiring the use of treatment plans. *Eckerhart, supra* at 921. *See also* Ritterbush cross-examination, at 38. Even after the initiation of the new policy, however, the treatment plans were inadequate. *Eckerhart, supra* at 921. Not until as late as 1979 did the quality of the plans improve to the level where the court could ultimately find them not to be constitutionally insufficient.[15] In the area of treatment plans, the testimony of Ritterbush, quoted above, again illuminates the role of plaintiffs' suit had in effecting the needed improvements. Although the court did not award complete relief on every single one of plaintiffs' challenges, it is apparent that defendants changed their practices in response to the litigation.

---

[15] Although the plans themselves were found to be constitutionally sufficient, the long delay in both preparation and review of the plans was found to deny each patient a minimally adequate treatment plan. *Eckerhart, supra* at 921-2.

3. Mail Policy

Similarly, defendants' mail policy changed markedly during the course of the lawsuit. Prior to 1977, all incoming mail was opened and checked for contraband outside the presence of the patients, *Eckerhart, supra* at 924 n.55, while all outgoing mail, except that addressed to "any official, lawyers, etc.", was read by hospital staff and censored. *Id.* Defendants modified their policy to allow all outgoing mail to be sent sealed, and for less mail to be opened outside the presence of the addressee. *Id.* at 924.[16]

4. Seclusion and Restraints

The last portion of the court's decision addressed defendants' policies on medication, seclusion and physical restraints. The Court held that defendants' practices (as contrasted with the existing policy) regarding seclusion and restraint in the Forensic Unit did not afford residents minimal due process. *Eckerhart, supra* at 927. Additionally, the court held that the use of seclusion as discipline required minimal *Wolff* v. *McDonnell* due process protections. Since no such procedures were followed, defendants' use of seclusion as discipline also violated the due process rights of residents. *Id.* at 928. The court did not find, however, in favor of plaintiffs' allegations that residents were over-medicated.

This review of the issues reveals that in each of the areas addressed by the Court, plaintiffs either obtained court-ordered relief or caused defendants to remedy the complained of condition, thereby alleviating the Court's need to order relief. Since there are not any material issues upon which plaintiffs failed to obtain relief, the "proportionality" issue which defendants raise is not presented by this case.

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[16] Defendants' mail policy was discussed in conjunction with their visitation and phone policy. The Court found the visitation and telephone policies to be violative of plaintiffs' rights. *Id.* at 924-25.

B. The record in the instant case is defective in terms of allowing an analysis of the proportionality issue.

The District Court's decision (reprinted in Appendix B to Petitioners' Brief) analyzed the plaintiffs' claim to attorneys' fees only in terms of whether they were a "prevailing party" within the context of § 1988. Having made that determination, the court held, "The relief afforded plaintiffs at trial is sufficient in itself to classify them as prevailing parties without the need of examining those issues disposed of prior to trial in order to determine which went in plaintiffs' favor. "[footnote omitted]" Appendix B at A-7. Not only is there no record on those mooted issues, but similarly a record and findings of fact are absent as to those issues and conditions which were ameliorated in direct response to plaintiffs' lawsuit. Without the benefit of a record on those matters, this Court would not be able to analyze adequately the question presented by defendants.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court not issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Petitioner's Brief

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No. 81-1244

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SUPREME COURT OF THE UNITED STATES

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for themselves and all other persons similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. § 1988, should be proportioned to fairly and accurately reflect the extent to which a plaintiff has prevailed on the merits of his lawsuit in the District Court?

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No. 81-1244

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,
Petitioners,

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN,
. . for themselves and all other persons similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet.App.A at A1-2) is unreported. The opinion of the United States District Court for the Western District of Missouri, Central Division, on the issue of attorneys' fees (Pet.App.B at A3-20) is also unreported.

The opinion entered by the District Court on the merits of the substantive issues in the lawsuit (A170-207) is re-

ported at 475 F.Supp. 908 (W.D.Mo. 1979). The opinion of the District Court on the merits is not the subject of the certiorari review granted by this Court. However, the opinion of the trial court on the substantive issues of this litigation will assist the Court to understand that the plaintiffs were much less than wholly successful with respect to the merits of their lawsuit.

JURISDICTION

The judgment of the Court of Appeals (Pet.App.A at A1-2) was entered on September 28, 1981. The petition for a writ of certiorari was docketed in this Court on December 24, 1981, and was granted on March 1, 1982. The jurisdiction of this Court rests upon Title 42 U.S.C. § 1254(1).

THE STATUTE WHICH THE CASE INVOLVES

Title 42 U.S.C. § 1988:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS, ' and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of

the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

I. *Introduction*

This Court has granted certiorari in the present case to determine the following question:

> "Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. § 1988, should be proportioned to fairly and accurately reflect the extent to which a plaintiff has prevailed on the merits of his lawsuit in the District Courts?"

The substantive issues in the lawsuit comprised a comprehensive constitutional attack on the conditions prevailing at and treatment provided by the Forensic Unit, Fulton State Hospital. The Forensic Unit consists of two residential units, the Biggs Building and the Rehabilitation Unit. The Biggs Building is the only Missouri mental health facility housing solely maximum security patients (A89). Both the Biggs Building and the Rehabilitation Unit are intended to house patients who have been determined to represent a danger to themselves or others (A89-90). The vast majority of Forensic Unit patients have been involuntarily committed for mental treatment as a result of their involvement with the Missouri criminal justice system (A130, 147). Throughout the litigation of the substantive issues in this case, the plaintiffs challenged virtually every

facet of the manner in which the defendants, both from a physical facility and programmatic point of view, provided care, treatment and custody to the patients committed to the Forensic Unit.

Neither the plaintiffs nor the defendants appealed the opinion of District Court on the merits. Therefore, the judgment of the District Court on the substantive issues in this lawsuit is relevant only insofar as it illuminates the contention of the defendants that plaintiffs' attorneys were compensated by the lower courts for their substantial failures to gain relief as well as for their successes on the merits.

II. *Procedural History*

This lawsuit was initiated by the filing of a three-count petition on April 27, 1972 (A9-14). The initial complaint alleged (1) that patients at the Forensic Unit were being denied their constitutional right to treatment, (2) that patients transferred to the Forensic Unit were being denied procedural due process, and (3) that patients at the Forensic Unit were entitled to compensation for their institution-maintaining labor.[1] The operative portion of the right-to-treatment count in the original complaint was highly generalized, alleging only that the defendants had injured plaintiffs by means of "grossly inadequate facilities, programs, personnel, medical treatment, psychiatric treatment and other unconstitutional features . . ." (ALL).

An amended complaint in the original action was filed on September 8, 1972 (A15-21).[2]

---

[1]Count II of the original complaint, the procedural due process count, was disposed of, by consent, in the Judgment, Order, and Decree filed by the District Court on December 3, 1983(A22-28).

[2]The allegations in this amended complaint of unconstitutional deficiencies in the operation of the Forensic Unit were somewhat more

(Continued on next page)

The original lawsuit was dismissed upon the motion of the plaintiffs and the action was refiled, under separate number and title, on April 12, 1975, at which time only the right-to-treatment and the institution-maintaining labor allegations remained (A29-32, 32-47). The complaint, as refiled under separate number and caption, was much more specific with respect to the alleged constitutional deficiencies of the mental health facility operated by the defendants (A39-43).[3]

Footnote continued
specific than the generalized statement made in the original complaint. Plaintiffs alleged:

"The Defendants have injured and continued to injure the Plaintiffs by the following means:

a. Grossly inadequate facilities, including but not limited to the absence of any privacy in the dormitory and toilet areas of each ward;

b. Grossly inadequate program, including but not limited to the absence of meaningful planning for discharge of inmates;

c. Grossly inadequate personnel, including but not limited to the absence of Registered Nurses to administer medication;

d. Grossly inadequate medical treatment, including but not limited to diagnosis of physical illness as psycho-somatic complaints or malingering;

e. Grossly inadequate psychiatric treatment, including but not limited to the almost total absence of individual psycho-therapy by certified psychiatrists; and

f. Other unconstitutional features of their confinement, including but not limited to the failure to segregate and protect juvenile inmates from assaults and intimidation by adult inmates." (A17).

[3]The specific contentions of the plaintiffs, in their complaint of April 12, 1975, respecting unconstitutional conditions and treatment included:

"a. The living facilities are grossly inadequate—lacking, among other things:

i. elemental privacy in the dormitory and bathroom areas on all the wards,

ii. safe, secure places where the patients can store their personal possessions and valuables,

(Continued on next page)

That portion of the plaintiffs' complaint concerning institution-maintaining labor was dismissed by the District Court on July 6, 1976 (A54) upon the motion for voluntary dismissal of plaintiffs (A48-53). Thereafter, only allegations respecting the right-to-treatment issues remained in the case, together with all the attendant subsidiary issues concerning independent and separate conditions of treatment afforded to patients of the Forensic Unit.

By permission of the Court, plaintiffs were allowed

Footnote continued

iii. frequently cleaned bed linen and mattresses so that some patients are forced to sleep on soiled beds.

iv. adequate ventilation during the hot weather and adequate heat during the cold weather,

v. comfortable furnishings so that the patients live in an environment almost totally devoid of lamps, sofas, comfortable chairs, pictures, rugs, magazines, books, games, and other accoutrements of normal living.

b. There are severe and arbitrary restrictions on the patients' access to the outside community including but not limited to the following:

i. unnecessarily few opportunities for socialization with women,

ii. extremely limited visitation privileges with family and friends,

iii. excessively limited and arbitrary access to grounds passes and furlough privileges,

iv. unnecessarily restrictive mail privileges that violate the patients' right to unfettered communication with the outside community.

c. The psychiatric treatment program is grossly inadequate in that among other things it does not provide for:

i. individualized treatment plans for each patient,

ii. A thorough physical and mental evaluation and diagnosis of each patient entering the hospital,

iii. adequate periodic reviews of the patients' mental health and amendments of the treatment plan in light of each patient's progress,

(Continued on next page)

to file an amended complaint on August 3, 1977. It was at that point in time that the caption of the case began to include the names of the parties which are now included as the parties to these proceedings in the Supreme Court. The complaint of August 3, 1977, was the last amended complaint filed before the trial of this case on the merits. The specific allegations concerning allegedly unconstitutional conditions and treatment are set below verbatim. Those allegations, and portions of allegations, which ultimately became the subject of judicial relief are italicized.

Footnote continued

iv. frequent and extensive meetings between each patient and a treating psychiatrist and/or qualified psychologist in order for the patient to re-evaluate himself vis-a-vis the rest of his community both in and out of the hospital,

v. a prognosis for recovery including a date on which the diagnostic staff believes the patient can be released with the possibility that the proposed release date can be revised in light of the speed with which the treatment plan is deemed.

d. The hospital staff in the Forensic Unit is grossly inadequate in quantity and quality which results in:

i. the absence of qualified mental health personnel to prescribe and administer medication,

ii. the absence of qualified mental health personnel to perform physical, occupational, music, and art therapy with the patients,

iii. an excessive reliance by Defendants and their subordinates in the use of psychotropic drugs not as part of the patients' treatment plan, but as a form of crowd control,

iv. poor medical treatment in the areas of preventive medicine, diagnostic treatment, and curative medicine. In short, the Forensic Unit fails to meet minimum constitutional standards in the following areas:

v. lacks adequately trained psychiatrists,

vi. lacks psychologists with different levels of training from Ph.D. to B.S. degrees,

vii. lacks psychiatric social workers,

viii. medical doctors,

ix. surgeons,

x. dentists,

(Continued on next page)

"17. There is a serious shortage of staff personnel in the Forensic Unit, in the following areas:

(a) a lack of a sufficient number of psychiatrists and physicians;

(b) a lack of a sufficient number of psychologists with different levels of training from Ph.D. to B.S. degrees;

(c) a lack of a sufficient number of psychiatric social workers;

Footnote continued

xi. registered nurses,

xii. occupational, art, music, recreational therapists,

xiii. nurses' aides who have received adequate training in the mental health profession,

xiv. lawyers to assist the patients with their legal problems both in and out of the hospital,

e. The abysmal lack of planning for placement of the patients has resulted in weaker, juvenile, or retarded patients being subjected to assaults, homosexual and otherwise, by more aggressive patients. Patients presently have little assurance from the staff or their placement in the hospital that they will not be the victims of assaults or beatings.

f. The Forensic Unit has no special programs or trained staff for the retarded patients.

g. There are few, if any, effective vocational rehabilitation programs for the patients so that the Plaintiffs have no reasonable likelihood of survival in the labor market when discharged.

h. An inadequately planned and staffed educational program so that patients who need and desire to acquire basic skills in reading, writing, and mathematics up through patients who could benefit from college level courses are denied an opportunity to learn.

i. An excessive reliance on the arbitrary and excessive imposition of ward restrictions, seclusion, isolation, and physical restraints.

j. Little or no opportunity for the patients to make complaints regarding the physical and social conditions of the hospital and a refusal on the part of Defendants and their agents to respond affirmatively to justified complaints." (A39-43)

To some degree, the plaintiffs prevailed on the allegations in subparagraphs a.i., a.iv., a.v., b.ii., c.iii., and i.

(d) a lack of a sufficient number of professional nurses, including registered nurses;

(e) a lack of sufficient number of psychiatric nurses' aides who have received adequate training in the mental health profession;

(f) a lack of a sufficient number of qualified occupational therapists and recreation therapists; and

(g) an inadequately staffed educational program.

18. An individualized written treatment plan, carefully designed and tailored to meet the specific needs and problems of the individual patient, is an essential component of adequate treatment. The so-called treatment plans for patients in the Forensic Unit are generally deficient in many ways. They are usually written without a qualified psychiatrist actually taking part in their formulation. They are usually unreasonably vague and non-specific in their statement of the patient's problems, the methods of treatment to be employed, the goals of treatment, and the identity of the individual staff persons assigned to carry out the patient's treatment. They usually lack altogether some elements which are essential to adequate treatment, such as a clearly stated rationale for the plan, and modifications to the plan in the light of patient's progress or lack of it. *And there have been, and there continues to be, instances of unreasonable delay between the time a patient is admitted and the time a treatment plan for him is formulated and implemented.*

19. Regular, frequent, and scrutinous review of patients' progress along the path of treatment is essential in order for adequate treatment to be maintained. Adequate review of patients' progress is not provided in the Forensic Unit. Clinical staffings for patients are held far too infrequently, *nor is there adequate periodic review of pa-*

tients' individual treatment plans, and amendments to those plans in the light of each patient's progress.

20. There is in the Forensic Unit an absence of a sufficient number of qualified personnel to prescribe and administer medication. There is also an excessive reliance upon the use of psychotropic drugs, not as part of the patient's treatment plan, but as a form of crowd control.

21. In the Biggs Building, patients are often placed in seclusion (solitary confinement in a small, locked room) as a means of controlling or attempting to control their behavior. Seclusion is employed in the Biggs Building for, among other reasons, disciplinary reasons, infractions of institutional rules, and types of alleged misbehavior which would be likely to result in the similar solitary confinement of an individual in a prison setting.

22. When physicians on the staff of Fulton State Hospital authorize placement in seclusion or continuation of seclusion for patients in the Biggs Building, they usually do not see the patient concerned, in order to evaluate firsthand the need for the patient's seclusion or continued seclusion, before signing the seclusion orders.

23. *The use of seclusion in the Biggs Building is generally* excessive, arbitrary, and *inadequately documented.*

24. Many patients in the Forensic Unit suffer from mental retardation.

25. The Forensic Unit lacks adequate specifically trained and qualified staff, special education and habilitative programs for those patients who are mentally retarded.

26. Living facilities for patients in the Biggs Building are grossly inadequate. *They lack, among other things, elemental privacy in the dormitory and bathroom areas on all wards. There is inadequate cooling of air temperatures*

during the hot summer months, and inadequate heating during the cold weather. There is a lack of comfortable furnishings, so that patients live in an environment almost totally devoid of lamps, sofas, comfortable chairs, pictures, rugs, and other accoutrements of normal living.

27. *Patients in the Biggs Building suffer severe and arbitrary limitations and restrictions on their rights to visit with family and friends.*

28. *In the Biggs Building, the limitations upon patients'* mail and *telephone privileges are severe, arbitrary and unnecessarily restrictive."* (A76-78)

Attorneys Ronald L. Carlson, Stuart R. Berkowitz, and Michael Bastian were granted leave to appear as attorneys for plaintiffs respectively on May 31, 1977, March 28, 1978, and March 22, 1979 (A61, 86, 87). Although his name does not appear on documents filed until later, attorney William A. Hyde began representing the plaintiffs in January, 1975.

This case was certified as a class action on September 16, 1977 (A81-85).

The trial of this lawsuit on the merits, in the District Court, consumed approximately three weeks beginning on April 30, 1979, and completed on May 17, 1979 (A3-6). Therefore, approximately seven years elasped between the filing of the initial complaint in this action and the ultimate trial of the lawsuit. In advance of trial, substantial stipulations of fact had been agreed to by the parties (A89-161). The District Court accepted literally hundreds of exhibits. The plaintiffs offered ten witnesses, including five expert witnesses. The defendants offered nineteen witnesses, including five expert witnesses.

The District Court entered its opinion on the merits of August 11, 1979. *Eckerhart* v. *Hensley*, 475 F.Supp. 908

(W.D.Mo. 1979) (A170-207). The relief afforded to the plaintiffs on the substantive issues litigated in this action, in context with the totality of the issues litigated, will be addressed in the succeeding section of this STATEMENT OF THE CASE.

On February 26, 1980, the attorneys for plaintiffs requested attorneys' fees, submitting memoranda and affidavits of four attorneys, William A. Hyde, Stuart R. Berkowitz, and Michael Bastian, employees of Legal Services of Eastern Missouri, Inc. and Ronald L. Carlson, professor at Washington University School of Law. The total hours claimed by counsel for the plaintiffs were 2,985.64 for a case which was tried in approximately three weeks.

The District Court entered its Memorandum and Order awarding plaintiffs attorneys' fees in the amount of $133,332.25 on January 23, 1981 (Pet.App.B at A3-20). The trial court awarded attorneys' fees on behalf of counsel for the plaintiffs at the hourly rates included in their submission. The only reduction in hours by the District Court was a thirty percent reduction in the total time claimed by attorney Hyde to reflect his failure to keep contemporaneous time records and his inexperience. The trial court made no adjustment in the attorneys' fees award to reflect the failure of the plaintiffs to obtain relief on many of the issues litigated.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the award by the District Court of attorneys' fees in a *per curiam* opinion (Pet.App.A at A1-2). That *per curiam* opinion was filed on September 28, 1981.

Upon the petition of defendants, this Court granted certiorari on March 1, 1982.

III. *The Relief Afforded By The District Court Upon Substantive Issues in This Case in the Context of the Totality of the Issues Litigated by the Parties*

The judgment of the District Court on the merits of this litigation is not being contested in this Court. What is being contested is whether the lower courts should have reduced the attorneys' fees request of plaintiffs by counting only those hours reasonably spent on claims that succeeded. To illuminate that contested issue, the defendants respectfully draw the attention of the Court to Standard Pretrial Order No. 2 filed by the parties on the morning the trial of this case began in the District Court (A162-169). Pursuant to Local Rule 20 of the United States District Court for the Western District of Missouri, the filing of the aforementioned document is required and supplements the pleadings in any given case. In part, parties are required, in Standard Pretrial Order No. 2, to stipulate that specific facts, and no others, remain to be litigated upon trial. In that document, the parties stipulated that certain specific substantive issues were being contested. Those agreed issues of fact are set out verbatim immediately below. The issues, and portions of issues, which ultimately became the subject of judicial relief are indicated by italics.

> "1. Does the Biggs Building [footnote omitted] provide a humane and therapeutic physical and psychological environment?
>
> 2. *Are the living conditions and environment in the Biggs Building inhumane?*[4]

---

[4]The Forensic Unit consists of two inter-related units. Shortly before the trial of this case, the plaintiffs had stipulated that the physical environment in the Rehabilitation Unit was adequate. With respect to

(Continued on next page)

3. Does the Forensic Unit provide more than custodial care to its patients?

4. Are the living conditions, physical and psychological environments in the Biggs Building so inadequate as to deny patients treatment and the opportunity to improve their mental condition?

5. Do the patients committed to the Forensic Unit receive adequate care and treatment to improve or give them an opportunity to improve their mental conditions?

6. Is the staff assigned to the Forensic Unit so inadequate as to render treatment impossible?

7. Are there sufficient numbers of qualified staff in the Forensic Unit to provide a minimally adequate level of treatment for the patients?

8. Are patients inappropriately placed in the Forensic Unit?

9. *Are patients maintained in the Forensic Unit for periods of time longer than is therapeutically necessary and thus deprived of treatment in the least*

Footnote continued

the Biggs Building, the trial court did not find that the building represented generally inhumane living conditions. *Eckerhart* v. *Hensley*, 475 F.Supp. 908, 917 (W.D.Mo. 1979) (A182). The court did identify certain physical aspects of the Biggs Building which were not minimally adequate. For the most part, every physical aspect of the Biggs Building found to be inadequate had already been the subject of approved appropriations by the Missouri General Assembly. Whether or not the lawsuit was responsible for those appropriations, or served as a catalyst to their passage, is an appropriate issue for the trial court on remand.

restrictive environment appropriate to their individual conditions and needs?[5]

10. Do patients have individualized treatment plans which reflect minimally adequate treatment?

11. Do patients receive individualized treatment programing?

12. *If patients do receive individualized treatment programing, is it sufficient to provide minimally adequate treatment?*[6]

13. Are patient medical files kept in such manner as to provide minimally adequate treatment?

14. Do mentally retarded and brain damaged patients have individualized habilitation plans which reflect minimally adequate treatment?

15. Do mentally and brain damaged patients receive individualized habilitation programing?

16. If mentally retarded and brain damage patients do receive individualized habilitation programing, is it sufficient to provide minimally adequate treatment?

---

[5]The finding of the District Court applied only to specific patients approved for transfer from the Biggs Building to the Rehabilitation Unit, the two facilities comprising the Forensic Unit which provide varying degrees of security, not to residents in the Forensic Unit generally, which had been one of the main contentions of the plaintiffs' case. The District Court did not find that any patient had been retained too long in the Forensic Unit or improperly committed to that facility. *Eckerhart* v. *Hensley, supra,* 475 F.Supp. 908, 922-923 (A193-195).

[6]Contrary to the position taken by the plaintiffs throughout this litigation in the trial court, the treatment plans prepared by the defendants were found to be minimally adequate. *Eckerhart* v. *Hensley,* 475 F.Supp. at 921-922 (A191-193). The lower court did find that the preparation of initial treatment plans was being unnecessarily delayed, and that the plans, as prepared, were not being sufficiently reviewed on a periodic basis.

17. Are seclusions and restraints sometime necessary in a maximum security institution?

18. Are seclusions and restraints used in a counter-therapeutic manner which is inconsistent with the goals of treatment?

19. *Do the present uses of seclusions and restraints in the Forensic Unit comprise an unreasonable danger to the physical well-being of the patients?*[7]

20. Is the manner and use of medication counter-therapeutic and inconsistent with the goals of treatment?

21. Do the present medication policies and procedures prevalent in the Forensic Unit comprise an unreasonable danger to patients?

22. Is defendants' mail policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic?

23. *Is the Biggs Building visitation policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic?*

24. *Is the Biggs Building telephone policy unduly restrictive, inconsistent with the goals of treatment and counter-therapeutic?*'' (Emphasis added) (A164-166).

In one of its orders respecting remedy, the District Court identified those issues upon which the plaintiff obtained relief as follows:

---

[7]The lower court found that policies and regulations regarding the use of seclusions and restraints, as published by the Missouri Department of Mental Health, were sufficient to protect the rights of patients. However, that court did find that defendants were not properly documenting the use of those policy safeguards which did exist. *Eckerhart* v. *Hensley*, 475 F.Supp. at 927 (A202-207).

"1. Climatic conditions in the Biggs Building;

2. Lack of privacy in lavatories and bathrooms;

3. Dormitory sleeping arrangements;

4. Lack of furnishings and availability of personal belongings;

5. Delay in preparation of treatment plans and lack of regular review thereof;

6. Delayed transfer to a less restrictive environment after a determination that a patient was no longer in need of maximum security confinement;

7. Inadequate provision for visitation and telephone use;

8. Inadequate procedural protections regarding the use of seclusion and physical restraints."

(A274-275).

The District Court entered its opinion on the merits on August 11, 1979. The lower court found that there did exist a constitutional right to treatment for the members of the plaintiff class (*Eckerhart* v. *Hensley*, 475 F.Supp. at 912-915 (A176-179), but adopted the constitutional standard proposed by defendants, *i.e.*, that an involuntarily committed mental patient has a constitutional right to such treatment as is minimally adequate to provide him a reasonable opportunity to be cured or to improve his mental condition. *Eckerhart* v. *Hensley*, 475 F.Supp. at 915-916 (A179-180).

The first substantive issued addressed by the District Court was that concerning physical environment in the Biggs Building.[8] After declining to replace the judgment

[8]Shortly before trial, the plaintiffs stipulated that the second component of the Forensic Unit, the Rehabilitation Unit, was possessed of adequate physical facilities.

of the defendants with its own respecting environmental issues, the lower court made the following finding:

> "Although plaintiffs' experts, as well as defendants' experts, had specific criticisms of the Biggs Building, none was willing to describe the facility generally as 'inhumane.' This Court has identified certain physical aspects of the Biggs Building that are not minimally adequate to provide the humane treatment environment required by the Constitution and will examine each in turn." *Eckerhart* v. *Hensley*, 475 F.Supp. at 917 (A182).

Specific deficiencies found included climate control (particularly high temperatures in late Spring and Summer months), lack of privacy in lavatories and bathrooms, lack of privacy in sleeping dormitories, and insufficient furnishings and personal belongings in eight of ten hospital wards. Except with respect to the finding of inadequate furnishings and personal belongings, in each instance the facility deficiencies found to exist by the District Court were fashioned specifically in terms of appropriations already made by the Missouri General Assembly and earmarked, in advance of trial, for the specific purposes made the subject of the trial court's order. In effect, the order of the trial judge, as it respected physical deficiencies, was almost entirely consistent with its knowledge of building and renovation programs already funded and underway. *Eckerhart* v. *Hensley*, 475 F.Supp. at 917 n.25 & n.26, 918 n.29 (A183-185).

With respect to staffing issues, including quantity and quality of professional treatment personnel, the trial court found that defendants' staff was minimally adequate. *Eckerhart* v. *Hensley*, 475 F.Supp. at 919-920 (A188-191). The plaintiffs obtained no relief with respect to staff issues.

In the section of the trial court's opinion pertaining to staff, plaintiffs' objection to the administration of medication by psychiatric aides was addressed and found not to have presented a constitutional deprivation. *Eckerhart* v. *Hensley*, 475 F.Supp. at 920 n.42 (A191).

With respect to individual treatment planning, the trial court found that the individualized treatment plans prepared by the defendants were minimally adequate, but found that defendants needed to implement initial treatment plans more quickly and to review plans on a regular basis. *Eckerhart* v. *Hensley*, 475 F.Supp. at 922 (A193).

With respect to issues of least restrictive environment, the court required the defendants to give priority attention to the waiting list for transfer of patients from the Biggs Building to the Rehabilitation Unit. *Eckerhart* v. *Hensley*, 475 F.Supp. at 922-923 (A193-195).

With respect to the defendants' visitation, telephone and mail policies, the trial court upheld the mail policy in the entire Forensic Unit, found the visitation and telephone policies in the Biggs Building to be overly restrictive, and upheld the visitation and telephone policies in the Rehabilitation Unit. *Eckerhart* v. *Hensley*, 475 F.Supp. at 923-925 (A195-201).

In that portion of its opinion concerning seclusion and restraint, the trial court first addressed the issue of the use of medication in the Forensic Unit. We quote:

> "Plaintiffs' contention that there is excessive use of medication to control patient behavior, a form of 'chemical restraint,' is not supported by the record. Expert witnesses from both sides testified that observation of patients and examination of records indicated that Forensic Unit patients are not overmedicated. [Footnote omitted]." *Eckerhart* v. *Hensley*, 475 F.Supp. at 926 (A201-202).

With respect specifically to seclusions and restraints, the trial court found that their use is a necessary and useful treatment device in mental hospitals, especially in a hospital treating dangerous patients. The trial court concluded that defendants' policies and regulations concerning the use of seclusions and restraints were adequate. The court found that defendants could use seclusions and restraints for disciplinary purposes. The trial court also found that defendants were not accurately documenting the use of restraints and seclusions for medical reasons, and that defendants should afford due process when ordering seclusions for disciplinary reasons. *Eckerhart* v. *Hensley*, 475 F.Supp. at 926-928 (A202-207).

The trial court did not address, and therefore, afforded no relief with respect to, many of the issues which had been advanced in this litigation by plaintiffs in their several complaints and amended complaints, and which had been identified by the parties in Standard Pretrial Order No. 2. For example, the court did not decide whether patients were inappropriately placed in the Forensic Unit, whether general medical files maintained by the defendants were adequate, and the various and subsidiary issues advanced by plaintiffs concerning the adequacy of the treatment afforded to mentally retarded and brain damaged patients. Also, the trial court specifically did not find that the plaintiff class was being denied, generally, the constitutional right to treatment, that the facilities operated by defendants were generally inhumane or unconstitutional, or that the treatment afforded to the plaintiff class by the defendants was inadequate to give each patient a reasonable opportunity to be cured or to improve his mental condition.

IV. *The Position of the District Court With Respect to the Issue Presently Under Review*

Citing *Newman* v. *Piggie Park Interprises, Inc.*, 390 U.S. 400, 402 (1968), the District Court posited that attorneys' fees should be awarded to a prevailing plaintiff "unless special circumstances would render such an award unjust." (Pet.App.Bat. A5-6). Summarizing the areas in which relief was obtained by the plaintiffs, the court found that the plaintiffs in this litigation were prevailing parties under the terms of § 1988. We quote:

> "Even though defendants prevailed on some of the issues presented to the Court, it is well settled that 'a party may be considered prevailing for purposes of section 1988 attorney's fees without meeting success on every claim he has made. . . .'" (Pet.App. B at A6).

Interpreting the defendants' position as asserting a strictly "mathematical approach comparing the total number of issues in the case with those actually prevailed upon," and citing *Brown* v. *Bathke*, 588 F.2d 634, 637 n.5 (8th Cir. 1978), the trial court found that under such a mathematical method "no consideration is given for the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues. . . ." (Pet.App. B at A8-9). The trial court refused to find that the amount of an award of attorneys' fees should be tied to those issues prevailed upon.

SUMMARY OF THE ARGUMENT

I.

The petitioners, defendants in the original proceeding before the trial court, recommend the adoption by this Court of the principle that an award of attorney's fees under § 1988 should be proportioned to compensate a plain-

tiff only to the extent that he has prevailed on his substantive claims.

In this case, plaintiffs were unsuccessful on many of the substantive constitutional claims they themselves chose to litigate. The unsuccessful claims were fractionable from those claims on which plaintiffs partially prevailed, requiring independent preparation and proof. The unsuccessful claims could have been maintained in separate lawsuits which would have resulted in no award of attorneys' fees. Consistent with sound public policy, the attorneys for plaintiffs should not be compensated for all time expended on a case of multiple constitutional claims when they prevailed only to an extremely limited degree.

Plaintiffs should be encouraged to assert their civil rights by the availability of attorney's fees if they prevail and by the fact that they will be required to pay for the fees of those they sue only if their claims are frivolous. Plaintiffs should not be encouraged to overplead or to burden the court with unnecessary and unsuccessful constitutional claims. The policy of this Court should nurture the proposition that litigation should be narrowly and carefully drafted so as to avoid the uneconomical judicial disposition of multiplicious claims asserted against state programs and institutions. Further, public policy considerations do not support financial awards against defendants who successfully vindicate their actions or facilities. Such results would lead to windfalls to plaintiffs, rewarding them for a shotgun approach to federal court litigation.

Many of the lower federal courts have adopted positions with respect to the proportioning of fees which are consistent with sound public policy and with the position of the defendants. There is, however, no consensus among the federal courts on the issue. It is important to distin-

guish between multiple claim lawsuits and cases in which alternative legal theories are argued. Several of the courts which have awarded fees for all hours expended, where plaintiffs were not successful on all issues, for example, the Eighth Circuit in *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978) and the Sixth Circuit in *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), have been confronted essentially with alternative legal theories situations. The distinction has been recognized by the District of Columbia Court of Appeals, *Copeland* v. *Marshall*, 641 F.2d 880, 892 n.18 (D.C.Cir. 1980).

Courts of Appeals have recognized not only that fees should compensate for time spent on successful issues, *Hughes* v. *Repko*, 578 F.2d 483 (3rd Cir. 1978); *Muscare* v. *Quinn*, 614 F.2d 577 (7th Cir. 1980), but that plaintiffs are responsible for maintaining records sufficient to assist courts to fashion equitable rewards. *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978).

II.

The plain meaning of § 1988 is consistent with the public policy considerations which dictate that a fees award accurately reflects the extent to which a plaintiff has succeeded in his lawsuit. Granting "discretion" to the federal courts, Congress clearly did not intend that limited success on one or more multiple claims automatically should require a trial judge to compensate all time expended on a case without reference to results obtained. Also, an award may be allowed only to "the prevailing party." It is not consistent to conclude that a plaintiff who loses a claim is entitled to attorney's fees for the time spent unsuccessfully pursuing it. And a "reasonable attorney's fee" presupposes a Congressional intent not to grant wind-

falls to unsuccessful plaintiffs nor to penalize prevailing defendants.

The legislative history of § 1988 is limited and does not indicate that Congress explicitedly anticipated the issue before this Court. The stated purposes of attracting competent counsel to civil rights cases and avoiding windfalls to attorneys, H.R. Rep. No. 95-1558, 94th Cong., 2d sess. 9 (1976); S. Rep. No. 94-1011, 94th Cong., 2d sess. 6 (1976), are not inconsistent with the public policy arguments, supportive of defendants' position.

III.

The defendants recommend that the Court reach a decision which will create reasonable guidelines for lower courts without removing their discretion in multiple claim fee cases. The courts should be allowed to determine which claims were successful and which were unsuccessful, to assess the relative importance of all claims, to judge whether the relief obtained with respect to one claim comports with the total relief sought on that claim, and to reach an overall conclusion as to the nature and extent of a plaintiffs' success, as well as the extent to which a defendant successfully defended, in the context of the case as a whole.

However, this Court should expressly direct that an award of attorney's fees must be proportioned to be consistent with the extent to which a plaintiff has prevailed, and only time reasonably expended in support of successful claims should be compensated. This would provide a sufficient incentive to civil rights litigants, especially in light of the extreme improbability that a prevailing defendant will be rewarded his attorney's fees.

ARGUMENT

Certiorari has been granted in this case to determine whether an award of attorneys' fees, made pursuant to 42 U.S.C. § 1988, should be proportioned to accurately reflect the extent to which a plaintiff has prevailed on the merits of his lawsuit in a district court. The federal statute upon which the resolution of this issue depends, commonly known as the Civil Rights Attorney's Fees Act of 1976, provides in pertinent part as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The defendant State officials, responsible generally for the operation of the Forensic Unit, Fulton State Hospital, the maximum security mental facility in the State of Missouri responsible for the care and treatment of dangerous mental patients, primarily committed by reason of their involvement in Missouri Criminal Justice System, submit that the award of attorneys' fees made by the District Court in this case, and affirmed *per curiam* by the Court of Appeals, erroneously fails to take into account the severely limited degree to which the plaintiffs prevailed. In this multiple claim litigation, attacking, on a constitutional basis, every conceivable component of the manner in which the defendants provide mental health services in Missouri's most secure mental facility, it was totally unjust for the District Court to order that the State of Missouri compensate plaintiffs' counsel for the pursuit of unmeritorious and unsuccessful issues, each of

which was advanced by the plaintiffs as the basis for separate and distinct remedial relief.

The issue before the Court, therefore, is whether an award of attorneys' fees should be based on the work performed on successful issues, thereby reflecting a reasonable relationship between the degree to which a plaintiff prevailed and the amount of attorneys' fees to be awarded, or whether a plaintiff, once found to have prevailed on any substantial claim in a particular case, is entitled to recover attorneys' fees for all time expended on the case, including his failures as well as his successes. In Point I of this brief, we shall demonstrate on public policy grounds, and as the context in which the issues arose in this case, the truly fractionable nature of the multiple claims made, on the merits, in the District Court, the limited degree to which the plaintiffs prevailed, and will discuss the applicable decisions of the lower federal courts. Point II will examine the plain meaning and legislative history of 42 U.S.C. § 1988. In Point III, we will suggest a standard to be applied by federal trial courts in multiple claim litigation and explain what determinations we believe should be made by the District Court in this case on remand.

I.

The principle that an award of attorneys' fees should be proportioned so as to accurately reflect the extent to which a plaintiff has prevailed represents sound public policy and should be adopted by the court.

A.

The Plaintiffs Did Not Prevail on Many of Their Constitutional Claims.

In the STATEMENT OF THE CASE portion of this brief, we included a detailed presentation of the multiple substantive claims litigated in this case as represented by

various pleadings of the plaintiffs and by the issues of fact as agreed to by the parties and filed on the morning that trial began. Each claim was based on a separate and distinct allegation of constitutional deprivation with respect to the manner in which the operations of the Forensic Unit, Fulton State Hospital, were conducted. It is not the intention of the defendants to litigate, in this Court, the extent to which they were successful in defending their facility from multiple constitutional attack. Once the legal principle is established that the term "prevailing party" means something of substance requiring trial courts to fashion awards of attorneys' fees to reflect the degree to which plaintiffs succeed in their cases, we believe that the trial judge in this case, having personal knowledge of the entire course of the litigation, including discovery, trial and remedial measures, would be uniquely qualified to pass judgment on the proportionate degree and nature of plaintiffs' success. We believe that the facts of the present case, as those facts relate to the failure of plaintiffs to obtain relief on many of their claims, illustrate the justice in equating the statutory term "prevailing party" with the principle that an attorney should not be rewarded for his failures.

On the face of the District Court's opinion on the merits, the defendants prevailed with respect to the standard to be applied in a mental health right-to-treatment case, on the issue of whether the physical environment of defendants' facility was generally inhumane,[9] on the issues re-

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[9]The relief which was afforded to plaintiffs with respect to the physical facility operated by the defendants was almost entirely tied by the District Court to planned renovations already in progress, and supported by appropriations, of which the trial court was apprised during trial. *Eckerhart* v. *Hensley*, 475 F.Supp. 908, 917 n.25 & 26, 198 n.29 (W.D.Mo. 1979) (A183-185). Therefore, the plaintiffs did not

(Continued on next page)

specting numbers and qualifications of professional and nonprofessional mental health staff, on the issue of whether medication could be administered by nonprofessional staff, on the issue respecting the adequacy of the individual treatment plans prepared by defendants' professional staff, on the issue respecting the constitutionality of defendants' mail policy, and upon the issues respecting the constitutionality of defendants' visitation and telephone policies as applied to one component of defendants' facility. It may be argued that the failure of the District Court to address some issues altogether represents an even more glaring failure of plaintiffs' case. Claims maintained by the plaintiffs throughout the litigation, as represented in the succeeding complaints and amended complaints and in the agreed factual issues filed on the morning the trial began, not only did not result in relief, but were ignored by the trial court. We submit that it must be assumed that counsel for the plaintiffs devoted a considerable amount of time to those issues. Those unaddressed issues included whether the plaintiff class generally was being denied their constitutional right to treatment, whether the treatment afforded by defendants gave plaintiffs an adequate opportunity to improve their mental conditions, whether some patients were inappropriately placed in the secure environment of the Forensic Unit, whether the medical files maintained by the defendants were adequate, and whether the defendants were adequately caring for and treating mentally retarded and brain damaged patients committed to the Forensic Unit.

Footnote continued
obtain relief with respect to physical facility, via a judicial disposition, which would not have been forthcoming absent a judicial order. The defendants do not contend that the District Court cannot, on remand, determine whether plaintiffs' lawsuit was a catalyst to the action of the Missouri Legislature in appropriating money for specific capital improvements.

The litany of unsuccessful issues from the plaintiffs' point of view, referred to above, does not even include the various and distinct claims maintained by plaintiffs at some point in the litigation, but abandoned in advance of trial. The unaddressed issues referred to above were all included in the statement of factual issues filed with the trial court on the morning trial began (A164-166).

The issues upon which plaintiffs obtained no relief whatsoever, and with regard to which they cannot be said to have prevailed, are truly fractionable from the claims which ultimately availed the plaintiffs some relief, *i.e.*, each claim advanced by plaintiffs could have served as an independent basis for a separate one issue lawsuit. For example, the issue as to whether defendants' facility was staffed with a constitutionally sufficient number of mental health professionals cannot be related, practically or conceptionally, to the issues of whether or not the Biggs Building was too hot in the summer and lacked sufficient patient privacy. Likewise, the time devoted by plaintiffs' attorneys to unsuccessfully contending that the defendants relied excessively on the use of psychotropic medications could have been of no assistance to the plaintiffs' attorneys in establishing the claim that the visitation and telephone policies in the Biggs Building were unduly resrictive. We submit that the multiple claims of the plaintiffs were fractionable, requiring independent attorney work on discovery, proof and research. Obviously, if the plaintiffs had initiated multiple lawsuits to address individual issues, each issue forming the basis for a separate claim for relief, they would have lost the majority of those lawsuits and would have received no fees for lost cases under any interpretation of 42 U.S.C. § 1988 .

B.

The Position Advanced by Defendants is Consistent With Sound Public Policy.

It would be unjust, and in derogation of sound public policy, to require a defendant to pay all attorney's fees for a plaintiff who has succeeded on less than all issues litigated. In such case, a court would in effect reward the plaintiff for the joinder of meritless claims. Plaintiffs would be encouraged to plead frivolously and burden the court with extra litigation.[10] A rule which would require the federal courts to fashion awards of attorney's fees to accurately reflect the extent to which plaintiffs prevail would encourage plaintiffs in civil rights litigation to narrow issues. Confronted with such a rule, plaintiffs would be more likely to litigate substantial claims, and the courts could devote their time to fashioning remedies for actual constitutional deprivations. If attorney's fees are not to be related to success, plaintiffs will be encouraged to launch voluminous attacks on state institutions and programs knowing that even a small victory can lead to a large reward. Further, awards of attorney's fees do act as a penalty against defendants. When a defendant has successfully defended against a specific claim, and a court has found that no constitutional deprivation exists, it would be entirely unjust to require that defendant, who has been vindicated and found not to have violated the constitutional rights of others, to compensate his opponent's counsel.

In the present case, $133,332.25 was awarded in attorneys' fees. Certainly, the issues upon which the plaintiffs did prevail, or partially prevailed, could have been reasonably prepared for judicial determination in much less

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[10]Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Award Act*, 80 Colum.L.Rev. 346, 376 (1980).

attorney time than represented by the award. The failure of the lower court to fashion an award of attorneys' fees responsive to that fact unduly enriched plaintiffs, counsel for their shotgun approach to litigation and for their failure to narrow and define the substantive issues in the case. Likewise, that failure unnecessarily penalized the defendants for maintaining an institution which successfully survived constitutional examination. In major civil rights litigation, attacking every element of a comprehensive state program or every conceivable condition of confinement or treatment at a state penal or mental institution, it can be expected that plaintiffs will hit upon one or more claims of merit. Unless this Court announces a policy which will discourage plaintiffs from pursuing multiple claims, when only a few are likely to prevail, prospective defendants will be required unnecessarily to defend broad-based litigation and courts will be required inefficiently to dispose of many issues which are not of constitutional magnitude. State financial resources and court time will be wasted. Fairness requires that a defendant be required to compensate opposing counsel only when that defendant has been found to have violated a substantive constitutional right. Judicial economy requires that civil rights litigation be easily manageable and contain precisely delineated claims.

C.

The Majority of Lower Federal Courts Have Reached Conclusions Which Support the Sound Public Policy Considered at Stake in this Litigation.

This Court has not previously been confronted with the precise issue contested in this case. However, there are a number of lower federal court decisions addressing this and closely related issues. To put it mildly, the lower federal courts have not reached a consensus on the issue.

Otherwise, there would be no lower court decision adverse to the defendants for this Court to review. Further, certiorari was granted in this case precisely because there exists disagreement between the circuits. Indeed, different panels of the same court of appeals have disagreed.[11]

In rejecting the position of the defendants, the District Court relied primarily on the Eighth Circuit case of *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978). *Brown* v. *Bathke* is the leading case in a line of Eighth Circuit precedent of an apparently adverse nature to the principle advanced by the defendants before this Court. However, *Brown* v. *Bathke* does not, on its facts, precisely support the failure of the District Court to proportion the attorneys' fees award in the present case so as to reflect the relative nature of plaintiffs' success in this multiple claim lawsuit. It is extremely important to distinguish beween a multiple claim situation and a case involving more than one legal theory in support of a specific claim for relief. *Brown* v. *Bathke* involved a plaintiff seeking relief upon multiple legal theories. The court relied upon only one of several legal theories, substantive due process, in order to reach the conclusion that the plaintiff was entitled to subsantially all relief requested. It is not entirely unreasonable for an attorney to be awarded research time for alternative, and often imaginative, legal theories when a court was required to rely upon only one theory in order to grant relief. Such a result is commonplace in those cases where plaintiffs plead both constitutional and statutory theories. Reliance by a court on the statutory theory, thereby avoiding the constitutional confrontation, does not necessarily suggest that a plaintiff should be

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[11]Compare the Seventh Circuit opinions in *Sherkow* v. *Wisconsin*, 630 F.2d 498 (7th Cir. 1980) and *Muscare* v. *Quinn*, 614 F.2d 577 (7th Cir. 1980).

denied time for research. A much different situation prevails, however, in a case, like the present one, in which multiple claims, each supported by separate and distinct allegations of constitutional deprivation, are maintained by plaintiffs.

We agree with the position taken by the Court of Appeals for the District of Columbia Circuit in *Copeland* v. *Marshall*, 641 F.2d 880, 891-892 (D.C.Cir. 1980). After finding specifically that no attorneys' fees compensation should be paid "for time spent litigating claims upon which the party seeking the fee did not ultimately prevail" the District of Columbia recognized the difference between multiple claims and alternative legal theories in a footnote.

> "However, it sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the 'issue was all part and parcel of one matter,' *Lamphere* v. *Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979), but only when the claims asserted 'are truly fractionable,' *id.*" *Id.* at 892 n.18.

Northcross v. *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), the primary authority cited by most recent lower court decisions approving of fees for all hours expended, suffers from a similar defect when applied to the facts in the present case. After long and protacted litigation and multiple appeals, the plaintiffs in *Northcross* were successful in having implemented a judicial order of desegregation for the schools of Memphis. Al-

though the precise nature of the ultimate remedy was hotly contested, and not entirely acceptable to plaintiffs, and various legal theories gained and lost significance as a result of changes in precedent during the pendency of the lawsuit, the plaintiffs prevailed on their case as a whole. The case did not involve fractionable claims for relief based on individual, distinct and separable allegations of constitutional deprivation. The case involved only the manner in which Memphis would be required to desegregate its schools. Therefore, the conclusion of the Sixth Circuit in *Northcross* that "[t]he fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. . . ," must be considered in the context of a case involving alternative legal theories as opposed to multiple claims.[12] The defendants submit that several other cases, which they

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[12]More precisely applicable to the present case is *Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir. 1981). That case was a prisoners' rights case analogous to the mental health right-to-treatment case resolved on the merits by the District Court in this proceeding. We submit that *Jones* v. *Diamond* represents the most relevant authority in support of the position adopted by the lower courts herein. However, in that case the Sixth Circuit did not explicitedly compel that all unsuccessful time expended must be compensated. We quote:

> "In fixing the fee, the district court should be mindful that in complex civil rights litigation, and particularly in prisoners' rights cases, issues are overlapping and intertwined. In order to represent their clients adequately, attorneys must explore fully every aspect of the case, develop all of the evidence and present it to the court. Time spent pursuing unsuccessful claims that were clearly without merit should be excluded. However, the mere fact that the litigants did not succeed in obtaining a judgment on all of the claims asserted does not mean that time spent pursuing these claims should automatically be disallowed. [Citations omitted]. Instead the court must consider the relationship of the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case." *Id.* at 1382.

assume will be cited by the plaintiffs in their brief, are also inapplicable to the present case on their facts because they concern situations involving alternative legal theories. See, for example, *Scigal* v. *Merrick*, 619 F.2d 160 (2nd Cir. 1980); and *Lamphere* v. *Brown University*, 610 F.2d 46, 47 (1st Cir. 1979), in which the First Circuit held that it was error to deny compensation for all hours expended for the simple reason that "counsel should not be penalized for every lost motion," but in which the plaintiff was successful in obtaining almost all relief sought.

We believe that the majority of the lower federal courts which have reached the issue now before this Court have adopted a position consistent with the principle advanced by the defendants. In *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978), the First Circuit did determine that plaintiffs might be considered "prevailing parties" for attorneys' fees purposes:

> "[I]f they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful. . . ." *Id.* at 279.

That court went on to caution plaintiffs to keep careful records concerning the proportionate amount of time spent on multiple issues in the lawsuit:

> "As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims." *Id.* at 279.

In *Hughes* v. *Repko*, 578 F.2d 483 (3rd Cir. 1978), the Third Circuit directed a district court to give a prevailing party credit only for hours which were reasonably supportive of successful claims. That court emphasized that the burden was on the plaintiff to establish that the hours claimed were reasonably necessary. On its facts, *Hughes* involved two plaintiffs seeking both compensatory and punitive damages against two separate defendants for housing discrimination. Both plaintiffs won only compensatory damages as against only one defendant. The district court reduced the fee award by two-thirds on the ground that the defendants had essentially won on two-thirds of the issues. The Third Circuit disagreed with the trial court's mechanical method of reduction but not with the underlying premise. In that court's view, a plaintiff can be deemed to be a prevailing party only to the extent that he has prevailed on a given issue and "cannot be treated as a prevailing party to the extent that he has been unsuccessful in asserting a claim." 578 F.2d at 487. Plaintiffs should be compensated only "in connection with the successful claims" and should be granted "credit only for the hours of legal services reasonably supportive of such claims." *Id.* See also *Walker* v. *Robbins Hose Company No. 1, Inc.*, 622 F.2d 692 (3rd Cir. 1980).

In affirming "in all respects" the decision of the district court in *Morton* v. *Charles County Board of Education*, 373 F.Supp. 394 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir. 1974), the Fourth Circuit has taken a similar position on the multiple claim attorneys' fees problem. In that case, the district court, which was affirmed, held that time spent by plaintiffs' counsel on claims which were not established should not be compensated. 373 F.Supp. at 411.

In *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), an action brought under § 1981 and Title VII, the Seventh Circuit held that:

> "[A]n award of attorney's fees can only be made to a prevailing party and as a general guideline the amount of the award should be proportionate to the extent that the party has prevailed in the suit. . . ."

A similar result was reached by the Seventh Circuit in *Muscare* v. *Quinn*, 614 F.2d 577 (7th Cir. 1980). In that case, the court held that "attorneys' fees should be awarded on plaintiff's successful claim that he was denied due process and not on his unsuccessful claim that the Fire Department's grooming regulation was unconstitutional." *Id.* at 580.[18]

In reversing a district court's denial of damages in a Title VII case, the Ninth Circuit in *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), directed the lower court to consider the amount of fees allowed in light of the plaintiffs' partial success. The Ninth Circuit noted that an award should be sufficient to encourage private enforcement but "the amount of the award should also be proportionate to the extent to which the plaintiff prevails in the suit. . . ." *Id.* at 1008. The Ninth Circuit has maintained the rule stated in *Schaeffer*, *supra*, and has applied the rule to awards of attorneys' fees under

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[18]Different panels of the Seventh Circuit Court of Appeals apparently disagree on the proportionality principle. See *contra*., *Sherkow* v. *Wisconsin*, 630 F.2d 498 (7th Cir. 1980); and *Janowski* v. *International Brotherhood of Teamsters Local No. 710 Pension Fund*, ____ F.2d ____, Nos. 81-1340 and 81-1359 (7th Cir., March 8, 1982), a common fund case which should be distinguished from a multiple claim conditions lawsuit.

§ 1988. *Sethy* v. *Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979).[14]

Finally, we believe that the Tenth Circuit has also adopted a position in support of the principal advanced by the defendants. See *Pearson* v. *Western Electric Company, Western Electric Installation Organization District Office*, 542 F.2d 1150 (10th Cir. 1976); and *Equal Employment Opportunity Commission* v. *Safeway Stores, Inc.*, 597 F.2d 251 (10th Cir. 1979). *Pearson* was a Title VII case ruling that a plaintiffs' entitlement to attorneys' fees is proportionate to the extent of his recovery. The statutory language of Title VII concerning attorneys' fees and that of 42 U.S.C. § 1988 is substantially, indistinguishable. Furthermore, the legislative history of § 1988 specifies that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976). In *Gurule* v. *Wilson*, 635 F.2d 782, 791-792 (10th Cir. 1980), the Tenth Circuit seemed to obfuscate their previous position by holding that it was inappropriate to reduce an attorney's fee, where the plaintiff prevails overall in the main issue in his case, for every unsuccessful motion. *Gurule* was not a classic multiple claim lawsuit, the plaintiff having prevailed for the most part in obtaining all relief sought. On rehearing, the Tenth Circuit clarified its position with respect to proportioning of attorneys' fees in multiple claim litigation in the following words:

> "On consideration of the defendant's petition for rehearing with a suggestion for rehearing en banc,

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[14]Arguably inconsistent results from the Ninth Circuit are represented by *Settle School District No. 1* v. *Washington*, 633 F.2d 1338, 1349-1350 (9th Cir. 1980), and *Gluck* v. *American Protection Industries, Inc.*, 619 F.2d 30, 33 (9th Cir. 1980).

> we believe a clarification of one part of our opinion is in order. We stated that in awarding attorneys fees to the prevailing party under 42 U.S.C. § 1988, it is inappropriate to proportionately reduce the fee for every motion where the party prevails overall on the main issue in the case. It was not out [sic] intention to suggest that a court may never proportionately reduce a requested attorneys fee for time spent on *substantial separate* issues which a plaintiff raises but on which he does not prevail. . . ." *Id.* at 794.

Even the Eighth Circuit has not uniformly approved awards of attorney's fees for all time expended by the attorneys for a partially successful plaintiff. We quote from *Johnson* v. *Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279, 1282 (8th Cir. 1980):

> "In redetermining the amount of fees to which appellant's attorney is entitled, the district court may, on remand, take into account appellant's limited success including the fact that she recovered on only Count I, and on that count for only five and one-third months out of a period of thirty-three and two-thirds months. . . ."

We submit that this Court should adopt the principle that an award of attorneys' fees, pursuant to 42 U.S.C. § 1988, in a case in which multiple claims are asserted and a multitude of alleged constitutional deprivations are claimed, should be proportioned to reflect the degree to which a plaintiff has prevailed. In adopting such a principle, the Court would be endorsing the positions taken by the majority of lower federal courts.

II.

The plain meaning of 42 U.S.C. § 1988, and such legislative history pertaining to this section as does exist, would support the rule that awards of attorney's fees should compensate plaintiffs only for claims on which they have prevailed.

The general American Rule is that the burden of attorney's fees will not be shifted absent express statutory authorization. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247 (1975). In response to this Court's reassertion of the American Rule in the *Alyeska Pipeline* case, Congress passed the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. As applied to this case, the award of attorneys' fees by the lower courts was appropriate only if § 1988 expressly authorized the award.

The Attorney's Fees Award Act permits a court, in its discretion, to allow the prevailing party in a § 1983 case a reasonable attorney's fee as part of the costs. The operative words in the statutory language are "discretion," "prevailing" and "reasonable." The foremost guide to legislative intention is the plain language employed in the statute itself.[15] The reason, as the Court emphasized in *S & E Contractors, Inc.* v. *United States,* 406 U.S. 1, 14 n.9 (1972) is found in the words of Mr. Justice Holmes:

> ". . . 'We do not inquire what the legislature meant; we ask only what the statute means.' The Theory of Legal Interpretation, 12 Harv L Rev 417, 419."[16]

The statute allows a court to award an attorney's fee "in its discretion." Disapproving of a mechanical division of hours for purposes of calculating attorneys' fees, the

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[15]Mr. Justice Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum.L.Rev. 527 (1947).

[16]*Stern and Gressman, Supreme Court Practice* 714 (5th ed. 1978).

District Court refused to adopt the position of the defendants because that position would allegedly create a "method of calculating fees . . . based strictly on a mathematical approach comparing the total number of issues in the case to those actually prevailed upon." (A7). As will be explained in Point III of this brief, the defendants do not assert that attorneys' fees should be proportioned on a mechanical basis without reference to the relative importance of particular issues and their impact upon practices of defendants. Nevertheless, the action of the District Court in awarding attorneys' fees without respect to the limited nature of plaintiffs' success is itself mechanical in the extreme. If a court is required to award attorneys' fees in a multiple claim civil rights condition case, without reference to the extent to which a plaintiff prevails, then that court is being denied the discretion to fashion an attorneys' fees award which fairly represents the relative success of the parties. No discretion is called for if a court is to award fees for all hours expended on a case, once a plaintiff has prevailed on any single issue, without reference to the overall merit of the lawsuit. To adopt the position of the lower courts in this proceeding would result in the mandatory award of attorneys' fees for all hours expended on the case once it was established that a plaintiff had prevailed on any substantial issue. Such a result would deny to the federal courts the authority to exercise their sound discretion contrary to the plain wording of § 1988. If once a § 1983 action is filed, attorney's fees are to be awarded for all time spent by plaintiff's counsel unless the defendant prevails on all claims raised by the litigation, then the language of the statute requiring a court to exercise "its discretion" has no meaning. A calculation of attorney's fees would be a totally mechanical exercise.

Not only must a court exercise its discretion, but

§ 1988 allows the award of attorney's fees only to "the prevailing party." It strains credibility to assume that this clear congressional language contemplates an award of attorneys' fees to plaintiffs for unsuccessfully litigating the question of whether defendants' facility was adequately and competently staffed. On that issue and on others, the plaintiffs in this litigation did not prevail. Had a separate lawsuit been instituted making claims solely limited to staffing matters, the plaintiffs could not have been awarded attorneys' fees for their time expended on the case. As the Third Circuit concluded in *Hughes* v. *Repko*, 578 F.2d 483, 486 (3rd Cir. 1978), only by limiting a fee award to include only those hours spent on successful claims can a court "apply the 'prevailing party' language of [§ 1988] fairly." The claims upon which the plaintiffs in this litigation failed to obtain any relief have been summarized in detail elsewhere in this brief. Because the plaintiffs did not prevail on those issues, the plain language of § 1988 does not authorize attorney's fees to be awarded for time expended on them. On remand, the District Court should be so instructed.

Finally, in the exercise of its discretion, a court may award a prevailing party only "a reasonable attorney's fee." Where a defendant successfully defends against a separate and fractionable claim, that he has violated the constitutional rights of a plaintiff, it most certainly is not "reasonable" for that defendant to be required to compensate his opponent's counsel for unsuccessfully suing him.

Congress did not explicitedly provide that the burden of attorney's fees were to be shifted upon the mere act of a plaintiff in filing an action. Rather, Congress provided for the shifting of attorney's fees only where a

party prevailed, advised the federal courts to exercise their discretion, and instructed the judiciary to award fees which were reasonable. It must be assumed that Congress believed that a reasonable attorney's fees award to a prevailing party was a sufficient inducement to encourage the initiation of civil rights cases by private attorneys general.

The legislative history accompanying the passage of the Civil Rights Attorney's Fees Awards Act of 1976 is limited in nature and content. The defendants submit that it is entirely unreasonable to conclude, on the basis of the limited legislative history available, that Congress contemplated the problem of awarding attorney's fees in multiple claim litigation where the plaintiffs were only partially successful. There is certainly no hint in the legislative history that Congress intended that defendants, who successfully defend claims of constitutional deprivation, should be made to bear the burden of their opponent's attorney's fees.

The stated purpose of Congress in enacting § 1988 was "to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys." H.R. Rep. No. 94-1558, 94th Cong., 2nd sess. 9 (1976); S. Rep. No. 94-1011, 94th Cong., 2d sess. 6 (1976). There is no indication that Congress intended to attract counsel, competent or otherwise, to bring losing cases or cases which were only partially successful. More glaringly, this stated legislative purpose most certainly does not indicate that Congress intended windfalls to attorneys who failed to establish specific claims. This Court has identified one purpose of the statute to be to discourage civil rights violations by increasing the potential liability of those who have ignored the law. *Carey* v. *Piphus*, 435 U.S. 255, 257 n.11 (1978). Clearly, such purpose is not advanced by

penalizing a defendant who has been found not to have violated the law on a particular claim.[17]

That portion of the legislative history of § 1988 most often quoted by courts awarding attorney's fees for all hours expended, without respect to unsuccessful claims, is included in Senate Report No. 94-1011, 94th Cong., 2d sess. 6 (1976), we quote:

> "It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D.Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶9444 (C.D.Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for a prevailing party should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all

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[17]With respect to the equally sparse legislative history of the counsel fee provisions in Title II and Title VII, the precise statutory language of which is extremely similar to § 1988, this Court concluded that:

> "If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis. . . ." *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 420 (1978).

time reasonably expended on the matter.' *Davis, supra; Standford Daily, supra* at 684."[18]

In the first place, defendants submit that antitrust litigation cannot be logically analogized to multiple claim conditions lawsuits. Apparently, § 1983 encompasses an infinite number of potential claims and constitutional issues. The antitrust laws are more precise, challenging a plaintiff to prove a violation of an existing and well defined statutory scheme. We believe that this is yet another example of the failure of Congress to contemplate the existence of the issue presently being reviewed by this Court. With respect to what is traditional for a fee-paying client, we ascribe to the position of the District of Columbia Circuit in *Copeland* v. *Marshall*, 641 F.2d 880, 891-892 (D.C.Cir. 1980):

> "Compiling raw totals of hours spent, however, does not complete the inquiry. It does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended. In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority. Thus, no compensation is due for nonproductive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time. Similarly, no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail." (Emphasis in original).

Stanford Daily, Davis and *Swann*, referred to in the

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[18]This legislative history language was cited as support of the conclusions reached in *Brown* v. *Bathke*, 588 F.2d 634, 636-637 (8th Cir. 1978) and *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 633 (6th Cir. 1979).

Senate Report, appear to have been cited in support of the proposition that a plaintiff need not recover damages in order to prevail for attorney's fees purposes. Certainly, those cases offer very little support for the proposition that a plaintiff in a multiple claim lawsuit should be compensated for time expended on unsuccessful claims. In *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 684 (N.D.Cal. 1974), the court did speak of compensating counsel for legal work "reasonably calculated to advance their client's interests." Standing alone, such language certainly does not indicate that counsel should be compensated for losing truly fractionable claims. Further, in the context of the facts of *Stanford Daily*, it is clear that the court was discussing whether an attorney should be compensated for work on a preliminary injunction, after the court found that the expenditure of time by the attorney prompted the defendants to take action to moot the claim. We interpret *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶9444 (C.D.Cal. 1974) as standing for the proposition that a plaintiff may be considered as prevailing for fee award purposes generally even though a limited amount of time was spent pursuing issues which did not become the subject of relief. In this case, we do not contend that plaintiffs should have been denied fees altogether. Both *Stanford Daily* and *Davis* are entirely dissimilar to the multiple claims situation at issue here.

Clearly, it cannot be concluded that Congress anticipated the issue in this case, in the context in which it appears before this Court, from reference to the legislative history of § 1988. It is clear, however, on the basis of that legislative history that the statute was not intended to produce windfalls to attorneys. Compensating attorneys for unsuccessfully litigating constitutional claims must be considered to be the type of windfall which Congress intended to avoid.

III.

The court should adopt a standard principle to guide the lower federal courts in fashioning awards of attorney's fees which fairly reflect the degree to which plaintiffs in civil rights litigation have prevailed.

In awarding attorneys' fees to the plaintiffs in this litigation, without respect to the limited nature of their success on the separate and distinct constitutional claims litigated, the District Court characterized the defendants' arguments as advancing a mathematical approach. The trial court concluded as follows:

> "Under this method no consideration is given for the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues. . . ." (Pet.App.B at A7-8).

The defendants did not suggest to the District Court a strict, mechanical proportionality formula, did not base their arguments before the Court of Appeals upon such a rationale, nor do they suggest to this Court that such a mechanical standard should be adopted. Nevertheless, we agree with the District Court that not all issues are equal, that issues may be partially prevailed upon, and that the court should be able to take into account voluntary action by the defendants which was prompted by the existence of the lawsuit. We believe that many of the issues on which defendants prevailed in the trial court were of considerably more constitutional import than any of the claims of plaintiffs which resulted in relief, and we also believe that with respect to each claim of plaintiff which was successfully asserted, the relief obtained by plaintiffs was substantially less than the relief which they sought.

The defendants recommend a flexible standard which would leave the lower federal courts the discretion to fash-

ion a reasonable attorney's fee tailored to the results of each particular case. However, those courts must be directed to award fees only for time expended by attorneys which was reasonably supportive of claims upon which they prevailed. A court should be allowed to assess the relative importance of the various claims asserted in each case. Obviously, some claims of constitutional deprivation, if established, will be of more importance than other claims, secure more benefit for the plaintiff, and have more impact, financially and programmatically, on the operation by a defendant of a program or institution. In determining the extent to which a plaintiff has prevailed, a trial court is in a unique position to assess the differing magnitude of multiple claims, both on the basis of their constitutional significance and on the basis of how much discovery and trial was devoted to establishing them.

Further, a court should not be put in a straightjacket or refrained from determining how successful, in a relative sense, a plaintiff was in establishing one specific claim. For example, in this case the quality of individualized treatment plans prepared by defendants was upheld by the trial court but the defendants were ordered to prepare the plans more quickly after admission of patients and to review those plans more frequently. Therefore, the plaintiffs were successful in challenging the process by which treatment plans are prepared for individual patients at defendants' facility, but they failed to establish the more important element of their claim because the treatment plans per se were found acceptable.

The defendants do not assert that judicially ordered relief is necessary before a plaintiff may be found to have prevailed on a particular claim for attorney's fees purposes. In fact, Congress voiced the intention that the term "prevailing party" is to be broadly interpreted so that a party may be considered to have prevailed where he has vindi-

cated his rights through a negotiated settlement.[19] Likewise, the defendants concede that, should this case be remanded to the District Court, it is within the authority of the trial court to determine that plaintiffs may have prevailed on some claims for attorneys' fees purposes if their lawsuit was the catalyst to voluntary action undertaken by the defendants which action precluded the need for a judicial remedy.

The defendants submit that a clear distinction should be drawn between civil rights cases in which multiple claims of relief are asserted and between civil rights cases in which alternative legal theories are advanced in support of an ultimate result. If a plaintiff pleads alternative legal theories, but a court affords him relief on the basis of one theory only, it is reasonable that the time spent by the attorneys for the plaintiffs in research of the alternative theories should be compensated. The pursuit of novel legal theories would thereby be encouraged. For example, if a plaintiff claimed relief alternatively on both a constitutional theory and a statutory theory, it is not unreasonable to expect, if warranted, that the trial court will afford relief on the basis of the statutory theory alone. However, if the constitutional claim was substantial, and provided an independent rational basis upon which the relief sought could have been predicated, then researching the constitutional claim should be compensated.

Therefore, we suggest that a court, in assessing attorney's fees under § 1988 in a case in which the plaintiff is partially successful, should examine each of the multiple claims asserted by the plaintiff, determine which claims, both successful and unsuccessful ones, were of the greatest constitutional magnitude, determine how successful, if at all, the plaintiff was on each claim asserted, and assess

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[19]See Senate Report No. 94-1011, 94th Cong., 2d sess. 5 (1976).

what effect, if any, the lawsuit had on the practices of the defendant prior to the judicial resolution of the case. Upon that basis, attorney's fees should be awarded to the plaintiff in an amount which fairly and accurately represents the degree to which he has prevailed. Appropriately, the burden of proof will be on the plaintiff to document and establish the time reasonably spent by his attorney on successful claims within the guidelines suggested. We agree with the position of the First Circuit that:

> "As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims." *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978).

We believe that these standards, proposed by the defendants for awards of attorney's fees in multiple claims civil rights actions, will result in awards which are fairly proportionate to the extent to which a party has prevailed.

Certainly, § 1988 as so interpreted will do more to encourage competent attorneys, as private attorneys general, to represent plaintiffs in cases involving civil and constitutional rights than would the English Rule, in which a plaintiff asserting two claims, only one of which was successful would break even on attorney's fees and who had asserted one claim, which was unsuccessful, would have to pay the attorney's fees of the defendant. Such a standard would also avoid windfalls to attorneys asserting unsuccessful claims. The rule proposed by the defendants would be sufficient to attract competent counsel to civil rights litigation. Plaintiffs have been sufficiently protected by the Congressional assurance that they will not have to

pay counsel fees to their opponents, unless it can be shown that their lawsuits were clearly frivolous, vexatious or brought for harassment purposes. Senate Report No. 94-1011, 94th Cong. 2d sess. 5 (1976). Defendants must carry the burden of their own attorneys' fees, whether or not they prevail. It is entirely unreasonable to expect that they will also have to bear the burden of attorneys' fees for plaintiffs' counsel, whether or not they prevail.

CONCLUSION

The judgment of the Court of Appeals, affirming *per curiam* the decision of the District Court assessing attorneys' fees against defendants, without proportioning the award to reflect the extent to which the plaintiffs prevailed, should be reversed, and this case should be remanded to the District Court for proceedings which will result in the award of attorneys' fees which fairly and accurately represent the limited degree to which the plaintiffs succeeded in their litigation.

Respectfully submitted,

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Respondent's Brief

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No. 81-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,

Petitioners,

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the district court complied with the standard prescribed by Congress in 42 U.S.C. §1988 when, in awarding attorneys' fees to plaintiffs as prevailing party, it looked to the ultimate results achieved by the lawsuit and rejected the mechanical, mathematical approach urged by defendants?

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No. 81-1244

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Plaintiffs find it necessary to present a separate statement of the case. The linchpin of defendants' argument in this case is a confused identification of factual issues with legal claims. That identification is first made in their statement of the case which relies centrally on a pre-trial order listing facts at issue in the case.

I. History of the Litigation

This lawsuit was brought by and on behalf of patients involuntarily confined to the Forensic Unit, Fulton State Hospital, who sought to secure their constitutional right to a minimally adequate treatment environment.[1] The action as originally filed consisted of a three-count complaint. Count I sought declaratory and injunctive relief regarding treatment and conditions in the Forensic Unit. Count II attacked defendants' practice and policy of placing patients in the Forensic Unit without procedural due process. Count III challenged defendants' practices and policies regarding institution-maintaining labor.

Count II of the original complaint was resolved by a consent decree filed in December, 1973, which secured essentially all the relief sought by plaintiffs in that count. The decree provided, *inter alia,* that defendants would provide due process hearings in connection with the placement of patients in the Biggs Building. (A 22-28).

Much of the relief sought by plaintiffs in Count III of the original complaint was accomplished by a modified policy on institutional labor adopted by the defendants.[2] Defendants

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[1] Located in central Missouri, Fulton State Hospital is the state's only forensic medical hospital. The Forensic Unit consists of two residential units — the Marion O. Biggs Building for the Criminally Insane and the Rehabilitation Unit. The Biggs Building is the only unit of the Missouri Department of Mental Health which houses solely maximum security patients (A 89). All of the Forensic Unit residents are male (A 90), and the majority are persons found not guilty by reason of mental disease or defect or involuntarily committed by the probate court. *Eckerhart* v. *Hensley,* 475 F.Supp. 911, 912 (W.D. Mo. 1979) (A 172).

[2] The District Court noted in its Order of August 2, 1974, that defendants had changed their policy on institution-maintaining labor at least "partially in response to . . . [plaintiffs'] request for a preliminary injunction."

agreed to compensate patients for institution-maintaining labor as then required by the Fair Labor Standards Act. Plaintiffs then voluntarily dismissed Count III of the complaint and thus dropped the remaining claim for compensation for past institution-maintaining labor performed by patients (A 48-54).[3]

The treatment environment challenged in Count I of the complaint was also modified during the pendency of the litigation. In January, 1975, the Missouri Department of Mental Health adopted Operating Regulation No. 149 which required that a written, individualized treatment plan for each patient must be prepared within five days after admission. *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 921n. 43 (A 192). The defendants in September, 1977, similarly altered certain challenged mail policies. Previously, all incoming mail had been opened outside the presence of the patient-addressee and searched for contraband. All outgoing mail, except that addressed to " 'any official, lawyers, etc.' was read and censored by hospital staff." *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 924n. 55 (A 198). Under the new policy, incoming mail from attorneys or officials would be opened only in the presence of the addressee while all outgoing mail could be sealed by patients without official screening. In the area of the staffing, the number of the treatment personnel also increased while the litigation was pending. Within the Biggs Building alone, the number of full-time nurses increased from 1[4] to 4 (A 113-4), full-time psychologists from 2[5] to 5 (A 106-7), and psychiatric aides from 60[6] to 141 (A 120-1).[7]

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[3] By the time plaintiffs dismissed Count III, the original lawsuit had been dismissed and refiled under separate title and number (A 32-47).

[4] Deposition of Dr. Bratkowski taken on November 17, 1976, at 12.

[5] *Id.* at 13.

[6] *Id.* at 39.

[7] Evidence in the record indicates that at least some of the changes, such as staffing (see testimony of Dr. Ritterbusch, *infra* at 20), were prompted by the lawsuit.

On August 3, 1977, plaintiffs filed an amended one-count complaint which alleged specific factual conditions violating minimum constitutional standards. On the basis of that single count, trial commenced on April 30, 1979, and lasted nearly three weeks (A 3-6). During the trial, plaintiffs called ten witnesses, five of whom were experts, defendants called nineteen witnesses, five of whom were experts (A 3-6), and the court received hundreds of exhibits.[8] The district court entered its opinion on the merits on August 11, 1979, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 908 (A 170-207).

In its substantive decision the court held that involuntarily committed mental patients at a maximum-security institution had a constitutional right to receive treatment. Defendants argued against any relief to the plaintiff class because, they claimed, there was no constitutional right to treatment for the subject population. Thus, the plaintiffs had to establish the existence of the right to treatment prior to litigating the various aspects of that right. Recognizing that "confinement in a state mental hospital *absolutely forecloses* receipt of any treatment except that which the state chooses to provide," *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 914 (A 177), (emphasis in original), the district court concluded that such patients were, if susceptible to treatment, entitled to "such treatment as will give each of them a reasonable opportunity to be cured or to improve his mental condition." *Id.* at 914 (A 178). The court also adopted plaintiffs' position that the essential elements of constitutionally adequate treatment included a humane physical and psychological treatment environment, sufficient number of qualified staff, and an individualized treatment plan for each patient, *id.* at 915 (A 179).

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[8] Defendants' "Memorandum in Opposition to Attorneys Fees," (hereinafter "memo. opp. fees") at 11.

Based upon extensive expert testimony presented by witnesses for both the plaintiffs and the State of Missouri, the district court then analyzed various aspects of the conditions of confinement at the hospital in light of their impact upon the treatment potential of patients. The district court found various constitutional violations in the conditions at the Forensic Unit.[9] Specifically, the court analyzed the six areas of policy and practice set out in plaintiffs' complaint, identified constitutionally inadequate conditions in five areas and subsequently ordered appropriate relief.[10]

(1) **Physical Environment:** The court concluded that conditions in the following areas were not minimally adequate to provide patients in the Biggs Building with the constitutionally required treatment environment — (a) poor climate control; (b) insufficient personal privacy in lavatories and bathrooms; (c) deficient patient privacy and security in the sleeping dormitories; and (d) sparse furnishings and space for individual belongings, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 916-9 (A 180-8). An extensive renovation plan was ordered to address all of these physical inadequacies. (A 275-6).

(2) **Staff:** By the trial date, the size of the treatment staff, which had markedly increased during the pendency of the lawsuit, was found to be minimally adequate, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 920 (A 188-91).

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[9] The district court emphasized that its analysis of the Forensic Unit was based upon a "minimally adequate" standard of treatment, *id.* at 915-6 (A 179-180).

[10] The district court directed defendants to submit a remedial proposal. After reviewing the proposal and requiring some adjustments in it, (A 274-82), the court entered its Order Regarding Remedy on August 27, 1980, (hereinafter O.R.R.).

(3) **Individual Treatment Plans:** The long delay after admission in preparing initial treatment plans and the absence of regular, substantive review of such plans denied patients minimally adequate treatment, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 921-922 (A 191-3). A three-part timetable was established for preparation of the plans, a 90-day time period was set for periodic review of the plans, and a Building Monitor was created to insure compliance with the deadlines. (A 276-7).

(4) **Least Restrictive Environment:** The long delay between the recommendation for a less restrictive environment and the time of actual transfer was found to be inconsistent with due process requirements, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 922 (A 193-5). A minimum timetable was established for the transfer of patients. (A 278-9; O.R.R. 1-2, 7).

(5) **Visitation, Telephone and Mail:** The visitation and telephone policies at the Forensic Unit were so overly restrictive as to constitute punishment and therefore were violative of patients' due process rights. *Eckerhart* v. *Hensley, supra,* 475 F. Supp. 923-5 (A 195-201). More liberal visitation and telephone policies were ordered (A 279-80; O.R.R. 4). The mail policy which had been modified during the pendency of the litigation was upheld, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 925 (A 201).

(6) **Seclusion and Restraint:** Defendants' policies designed to monitor medical decisions ordering seclusion or restraint were not sufficiently implemented to afford patients minimal due process. Specific guidelines and procedures were ordered to insure that defendants' practices complied with established policies. (A 281). The court also concluded that the unavailability of minimal due process procedures when seclusion was to be used as a disciplinary measure violated patients' constitutional rights, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 926-8 (A 201-7). The establishment of minimal due process procedures was ordered. (A 281-2; O.R.R. 5-6). The district court also addressed

the over-medication issue within this portion of its opinion, and found that the patients were not over-medicated.

Defendants did not appeal the district court's substantive decision or its orders granting the attendant relief.

II. The Fees Request

On February 26, 1980, plaintiffs submitted their request for attorneys' fees, accompanied by affidavits and memoranda (A 208-71). Throughout the lawsuit, plaintiffs have been represented by Legal Services of Eastern Missouri (hereinafter, LSEM), a non-profit legal aid organization. The representation was provided primarily by three LSEM attorneys — Stuart R. Berkowitz, Michael Bastian, and William A. Hyde. Professor Ronald Carlson of Washington University also participated in plaintiffs' representation (Pet. App. at A 4).

Based on the time spent preparing and trying the lawsuit, plaintiffs requested an award of $150,477.85[11], plus costs. They did not seek compensation for any time expended prior to 1975 or for the work contributed by other LSEM staff attorneys, paralegals, law clerks, and support staff, (Pet. App. B at A 4, n.4).

Defendants in June, 1980, filed a "Memorandum in Opposition to Plaintiffs' Attorneys' Fee Request" (Cert. doc. ent. at 13). In their memorandum, defendants made a series of arguments suggesting that the fee award should be either reduced or denied altogether. They argued, in part: (1) the applicability of a "public interest discount," (Memo. opp. fees at 22); (2) the

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[11] The components of the requested award were:

Attorney	Hours	Rate Per Hour	Total
Mr. Berkowitz	817.50	$65.00	$53,137.50
Prof. Carlson	214.75	$65.00	$13,958.75
Mr. Bastian	524.60	$50.00	$26,230.00
Mr. Hyde	1428.79	$40.00	$57,151.60

unreasonableness of the entire fee request, thereby urging a total denial of fees for time submitted by Hyde and Carlson and a seventy percent reduction for Berkowitz and Bastian, *id* at 24; and (3) that because the entire fee request was unreasonable, the court should refuse to award any fees whatsoever, *id.* at 40. Defendants also requested the reopening of discovery for the limited purpose of developing evidence on the attorneys' fees issue. Although their request was granted on July 17, 1980, (A 7), defendants never undertook any such discovery.

On October 16, 1980, the district court held an evidentiary hearing on the attorneys' fees request. In lieu of live testimony, plaintiffs offered into evidence the affidavits and time sheets attached to their motion for attorneys' fees (Transcript of Attorneys' Fees Hearing at 4) (hereinafter, AFT). The defendants made no objection to the admission of that material, and the court received it into evidence, (AFT at 4). After the court had taken "judicial notice of the entire case file for those purposes . . . pertinent to determination of reasonable attorneys' fees" and excluded two minor exhibits, plaintiffs closed their portion of the hearing, (AFT at 10).

Except for three exhibits which were not relevant to the issue before this court,[12] defendants did not offer any evidence at the attorneys' fees hearing, (AFT at 10-13). The remainder of the hearing consisted of oral argument by the parties, (AFT at 13).

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[12] The three exhibits arguably went to support defendants' argument, now abandoned, that there should be a "public interest discount," i.e. that a fee award should be tied to the "actual cost" to the program of providing the representation. Exhibit 1 was a letter which set forth LSEM's budget for the years in question. Exhibit 2 was a letter from the program to Professor Carlson, indicating that he would receive any fees awarded for his time. Exhibit 3 was a statement of the salaries paid to Berkowitz, Bastian, and Hyde in the years for which they sought fees. (AFT at 10-12). Plaintiffs produced the materials by agreement. No other information was sought or produced by way of any discovery devices, (cert. doc. ent. 12-14), and none was offered into evidence by defendants, (AFT 10-13).

III. The Fees Decision

On January 23, 1981, the district court issued its memorandum and order awarding attorneys' fees to plaintiffs. In several steps, the court analyzed plaintiffs' entitlement to attorneys' fees and the reasonableness of the award.

The court first considered whether plaintiffs were the prevailing parties under the terms of the Fees Act and eligible for a reasonable attorney's fee, (Pet. App. B at A 5). In light of the "relief afforded plaintiffs in the areas of physical environment, individual treatment plans, least restrictive environment, visitation and telephone privileges, and seclusion and restraint practices," the district court concluded that plaintiffs were the prevailing party under §1988, (Pet. App. B at A 6).

The "substantial" relief obtained by plaintiffs at trial was "sufficient in itself to classify them as prevailing parties without the need of examining those issues disposed of prior to trial in order to determine which went in plaintiffs' favor," (footnote omitted) (Pet. App. B at A 7). Finding no "special circumstances" making such an award unjust, the court held that plaintiffs were entitled to reasonable attorneys' fees, (Pet. App. B at A 6).

The district court then addressed defendants' contention that the fee award should be proportionate to the extent plaintiffs prevailed. Essentially, defendants had argued that the court "should look at the total number of issues raised during the entire course of this litigation, compare that number with the issues on which plaintiffs actually prevailed at trial, and then award attorneys' fees only for time spent by plaintiffs on the issues on which they prevailed," (Pet. App. B at A 7). However, the court found that such "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" left no room to consider "the relative importance of various issues, the interrelation of issues, the difficulty in identi-

fying issues, or the extent to which a party may prevail on various issues," (Pet. App. B at A 7-8). Therefore, the district court rejected the argument that "an award of attorneys' fees should be tied solely to those issues prevailed upon," (Pet. App. B at A 8).

Finally, the court analyzed each of the twelve *Johnson* v. *Georgia Highway Express* factors to determine the amount of a reasonable fee, 488 F.2d 714 (5th Cir. 1974). After reviewing the attorneys' affidavits, the court reduced the compensable hours of one attorney.[13] Except for that single adjustment, the district court found that the submitted hours were reasonable and non-duplicative, (Pet. App. B at A 13-14). The hourly rates requested for each attorney[14] were found to be well within the customary range of fees, accurately reflective of the respective abilities of counsel, and reasonable in all other respects, (Pet. App. B at A 18-19). As a result of its analysis, the district court awarded plaintiffs attorneys' fees in the amount of $133,332.25 and costs in the amount of $15,177.40.

In a *per curiam* unreported decision filed September 28, 1981, the United States Court of Appeals for the Eighth Circuit affirmed the award, concluding that the district court's decision was neither clearly erroneous as to its factual determinations nor mistaken as to the law as it was applied to the facts, (Pet. App. A at A 2).

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[13] Mr. Hyde's hours were reduced by 30% based in part on the lack of contemporaneous time records and his relative inexperience, (Pet. App. B at A 13).

[14] *See* note 11 *supra*.

SUMMARY OF THE ARGUMENT

I.

On its facts, this case simply does not present the question of whether a fee award should be proportioned to the extent plaintiffs prevailed. Application of the proportionality formula presupposes that plaintiff failed to obtain relief on one or more substantial claims. Since plaintiffs won court-ordered relief or elicited remedial actions from defendants on virtually all material claims advanced, the proportionality issue is not framed by this suit.

Plaintiffs proceeded to trial on a one-count complaint asserting plaintiffs' constitutional right to minimally adequate treatment and challenging certain limited aspects of the treatment environment provided by defendants. Holding that the Forensic Unit patients had a constitutional right to treatment, the district court found that the treatment environment was constitutionally inadequate in five particular areas — physical environment, individual treatment plans, least restrictive environment, visitation, telephone and mail policies, and seclusion and restraint — and ordered relief in each area. In the area of staffing, court-ordered relief was unnecessary because plaintiffs' lawsuit had prompted defendants to take remedial actions. The "catalytic role" which the lawsuit played with respect to defendants' remedial actions is established by testimony from defendants' own witness.

The legislative history of the Fees Act makes clear that the catalytic effect of a lawsuit is a sufficient basis for awarding attorneys' fees, S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976). When the court-ordered relief is combined with the remedial actions caused by the suit, it is clear that plaintiffs prevailed on practically every material claim. Since plaintiffs succeeded in obtaining relief on virtually all material claims, the proportionality issue — with its assumption that at least to some extent plaintiffs did not prevail — is not presented by this case.

II.

A. The fees decision of the district court, based in part on the ultimate results achieved in the case as a whole, was completely consonant with the standards and guidelines prescribed by Congress in the Fees Act. The Fees Act is a broad Congressional charter authorizing courts to award fees to prevailing parties in civil rights litigation. In the legislative history accompanying the Act, Congress provided the courts with more detailed and thorough directives on applying the fee-shifting remedy. That legislative history has been authoritatively cited by this Court. *See Maher* v. *Gagne,* 448 U.S. 122 (1980); *Hanrahan* v. *Hampton,* 446 U.S. 754 (1980); *Hutto* v. *Finney,* 437 U.S. 678 (1978).

The legislative history expressly provides that in determining an appropriate fee award under the Act, "counsel for prevailing parties should be paid '*for all time reasonably expended on a matter,*' " S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (quoting *Davis* v. *County of Los Angeles,* 8 E.P.D. ¶9444 (C.D. Cal. 1974) (emphasis added). Congress further indicated that the proper standard had been applied in *Davis* and *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974). By endorsing the fees analysis in those two cases, Congress explicitly rejected the proportionality theory which defendants urged on the district court in this case. Rather, Congress approved a method of fees analysis in which the court first determines the prevailing party and then, by looking at the case as a whole, evaluates what time was reasonably expended on a matter. Under the standard prescribed by Congress, legal services for a prevailing party are reasonably expended unless they were spent pursuing a) claims "in bad faith"; b) "clearly meritless claims"; or c) claims so wholly unrelated, causes of action so clearly separate, or issues so distinguishable and discrete that the time involved in litigating them in no way contributed to the "ultimate result achieved." Like the courts in *Davis* and *Stanford Daily,* the district court here found a mathematical proportionality theory

unacceptable. It instead looked at the case as a whole and considered the time spent on claims in light of the overall results obtained. Its method of analysis was thus fully consistent with the intent of Congress in the Fees Act.

B. Because of Congress' exclusive authority to allow attorneys' fees, the expressions of legislative intent and purpose recorded in the statutory history of the Fees Act deserve particular weight and attention. Every circuit court giving due weight to the expressions of Congressional intent in the legislative history of the Fees Act has rejected a proportionality theory. As the Sixth Circuit recognized in *Northcross* v. *Board of Education of Memphis City Schools,* 611 F.2d 624, 632 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), the Congressional standard of awarding fees "for all time reasonably spent on a matter" is especially compelling because "the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees."

III.

Reflected in the legislative history of the Fees Act are matters of public policy which Congress considered in determining the appropriate standard for fee awards under the Act. Congress prescribed the standard of awarding attorneys' fees for all time reasonably expended because that standard promotes vigorous private enforcement of civil rights laws, encourages compliance with both the letter and spirit of professional ethical considerations, and facilitates judicial economy and efficiency. In contrast, the proportionality theory would discourage precisely the zealous representation intended by the Fees Act and required by the Code of Professional Responsibility. In addition, that theory would either overwhelm the court in an endless inquiry trying to separate the time spent on interrelated issues or else lead it to apply a mathematical formula incapable of measuring the interrelation of issues and their contribution to the ultimate results achieved in this case.

The Congressional standard, on the other hand, allows the district court to exercise its discretion in a framework which takes into account the overall result of the suit and the contribution of various claims to that result. The fee award of the district court in this case was fully consistent with the guidelines provided by Congress.

ARGUMENT

The issue presented here is whether the district court exercised its discretion in consonance with Congressional intent when it awarded fees based in part on the ultimate results achieved in the case as a whole and rejected defendants' contention that fees should be proportioned on a mathematical basis to only those issues resulting in court-ordered relief.

At the time of trial, plaintiffs' lawsuit challenged in a single-count complaint the constitutional adequacy of the treatment environment at Missouri's forensic mental health institution. In their brief, defendants have suggested that the suit took a "shotgun" approach attacking every conceivable condition of the mental institution. To the contrary, there was only one claim at issue by the time of trial — whether the Forensic Unit patients had a constitutional right to receive treatment which would "give each of them a reasonable opportunity to be cured or to improve his mental condition," *Eckerhart* v. *Hensley, supra,* 475 F.Supp. at 914 (A 178). The factual contentions in plaintiffs' last amended complaint were directed simply to particular deficiencies in that treatment environment. Plaintiffs did not fire randomly at the panoply of conditions and practices — diet, sanitation, housekeeping — in the Forensic Unit. Rather, they focused narrowly on those conditions affecting adequate treatment. Since those conditions of treatment were necessarily interrelated, the lawsuit, from pre-trial preparation through trial on the merits, was seen, heard and resolved as a single matter.

In its decision on the merits, the district court found various violations of the Eighth and Fourteenth Amendments as well as 42 U.S.C. §1983 and later ordered substantial relief to remedy those violations. Throughout their brief, defendants seek to relitigate and thereby to minimize the extent to which plaintiffs prevailed on their challenge to the inadequate treatment afforded

patients at the Forensic Unit.[15] A comparison of plaintiffs' claims with the relief ordered by the court and the remedial actions taken by defendants over the course of the litigation establishes beyond any doubt that plaintiffs obtained relief on virtually every material claim. Recognizing the far-reaching results achieved by plaintiffs' case as a whole, the district court concluded that:

> The significance of this case cannot be measured in terms of dollars and cents. It involves the constitutional and civil rights of the plaintiff class and resulted in a number of changes regarding their conditions and treatment at the state hospital . . . . Plaintiffs' relief affects not only them but also numerous other institutionalized patients similarly situated. (Pet. App. B at A 16.)

The court subsequently awarded plaintiffs' counsel attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 (hereinafter, the Fees Act or §1988).[16] In light of the ultimate results achieved on the interrelated claims at issue, the district court's fee award meets the standard for a reasonable attorneys' fee prescribed by Congress in the legislative history of the Fees Act.

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[15] Significantly, defendants concede that plaintiffs are the prevailing party and therefore have not presented that issue for review here.

[16] The Fees Act provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. §1988.

I. On Its Facts, This Case Does Not Present The Question Of Whether An Award Of Attorneys' Fees Should Be Reduced Proportionate To The Extent Plaintiffs Did Not Prevail Because The Plaintiffs In This Complex Civil Rights Litigation Obtained Substantial Relief On Virtually Every Material Claim.

On its facts, this case simply does not present the question of whether a fee award should be proportioned to the extent plaintiffs prevailed. Application of the proportionality formula presupposes that plaintiffs have failed to obtain relief on one or more substantive claims. Since the plaintiffs in this case won court-ordered relief or elicited remedial actions from defendants on nearly every material claim advanced, the proportionality issue is not framed by this suit.

In its opinion on the merits, the district court found constitutional violations in five out of the six categories of inadequate treatment alleged in plaintiffs' final complaint.[17] Those six categories were: (1) physical environment; (2) staffing; (3) individual treatment plans; (4) least restrictive environment; (5) visitation, telephone and mail; and (6) seclusion and restraints. Staffing was the only category in which the court found no constitutional violation, but in that area plaintiffs' lawsuit had prompted defendant to take significant remedial actions.

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[17] Plaintiffs' final complaint (A 71-80) included only twelve paragraphs which even arguably contained allegations of inadequate treatment. The district court in its substantive decision reorganized those allegations into six general categories. As demonstrated by the chart, *infra* at 25-31, the court's categories faithfully mirror the treatment allegations in plaintiffs' pleading.

Defendants repeatedly cite to the Pretrial Order Number 2 prepared by the parties. Plaintiffs question the appropriateness of using that pleading as a point of reference. Defendants' suggestions fail to distinguish between "factual issues" and "claims". At best, the pretrial order consists of various alternative formulations of factual issues in the lawsuit. This statement of issues is to be distinguished from a party's legal claim. In this lawsuit, plaintiffs' legal claim was that defendants were denying plaintiffs their constitutional right to receive treatment.

After finding constitutionally inadequate treatment in five of those six categories, the district court ordered relief to remedy conditions in each of those five areas.

1. **Physical Environment:** To remedy climatic conditions in the Biggs Building, the court ordered installation of new heating and cooling systems. Completion of the three-phase project would provide improved heating and cooling for eleven patient wards as well as for the therapy, treatment, recreation, administrative, kitchen and dining areas of the facility (A 275-6). In order to increase patient security and privacy, windows and security screens were to be replaced, toilet facilities remodeled, and seven sleeping dormitories partitioned into individual rooms (A 275-6). Additionally, defendants were directed to provide furnishings for all individual patient rooms in the Biggs Building (A 276).

2. **Individual Treatment Plans:** To prevent delays in preparing initial treatment plans, the court ordered implementation of a three-step planning procedure with specific timetables for each step. An initial treatment plant — essentially, an admissions checklist — had to be prepared within five working days of the patient's admission. A more specific, intermediate treatment plan would be completed in the next fourteen working days. The final treatment plan with defined treatment goals, staff assignments and achievement date, had to be developed in the ten ensuing working days. To establish regular review, this goal-directed treatment plan was to be formally reviewed every ninety days. In addition, a Building Monitor was charged with insuring compliance with the plan development timetable and the review schedule. (A 276-7).

3. **Least Restrictive Environment:** To eliminate the historical pattern of long delays in transferring Biggs patients to the less restrictive environment of the Rehabilitation Unit, the court required that such transfers take place within ten working days after the determination of patient eligibility. The court further

ordered development of specific timetables for the transfer of eligible mentally retarded residents and other approved Forensic Unit patients to less restrictive facilities, (A 278-9); O.R.R. 1-2).

4. **Visitation and Telephone Use:** The existing visitation room in the Biggs Building was to be remodeled, and a new room allowing for less structured visitation was to be constructed. Expansion of visitation hours was ordered, and restrictions on visits by children were liberalized. The court also required modification of defendants' restrictions on telephone use. (A 279-80; O.R.R. 4).

5. **Seclusion and Restraint:** Regarding medical decisions on the use of seclusion and restraints, the court laid out specific guidelines to insure that defendants implemented their own policies governing those decisions. Where seclusion was used for disciplinary purposes, the court ordered implementation of minimum due process procedures including written notice, a hearing before a three-person panel, and a written opinion by the fact-finder, (A 281-2, O.R.R. 5-6).

Plaintiffs thus obtained court-ordered relief in five of the six categories of inadequate treatment.

Court-ordered relief in the area of staffing was unnecessary because the lawsuit had prompted defendants to take remedial actions in that area. Over the course of the litigation, the size of the treatment staff had increased dramatically. In the Biggs Building, for example, the number of full-time nurses quadrupled while the number of psychiatric aids and full-time psychologists more than doubled.[18] As a result, the court found that by the time of trial, staffing levels were not constitutionally insufficient, (A 190-1).

Defendants' own testimony establishes the relationship between the litigation and their remedial actions. During the

May 9, 1979 cross-examination of Dr. James K. Ritterbusch, Superintendent of Fulton State Hospital, plaintiffs' counsel examined the witness about the hospital's most recent funding request to the legislature.[19]

Q: Doctor, under objectives it states:

> . . . "The Forensic Unit is at present involved in defending a class action lawsuit from the Legal Aid Society of St. Louis. To successfully defend this lawsuit, the Attorney General has advised us that we must completely implement these individual treatment plans as soon as possible. The additional personnel and clerical staff and equipment used for their support are necessary to meet this demand."
>
> Do you recall that statement, Doctor?

A: Yes, Sir.

Q: That statement was contained in the budget request, was is not?

A: Yes, Sir.

* * *

Q: And, you asked for this additional personnel in the context of this lawsuit, did you not?

A: Yes, Sir.

(Ritterbusch cross-examination at 32-3.)

The key role of the lawsuit in causing defendants to enlarge the Forensic Unit Staff was thus established.

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[18] *See supra,* p. 3.

[19] Plaintiffs' Exhibit 793.

During the lawsuit, defendants undertook remedial actions in two other areas, but their actions did not obviate the need for court-ordered relief in those categories.[20] In the area of individual treatment plans, the defendants did not adopt a policy requiring such plans until January, 1975 — after commencement of the lawsuit, (A 191-2). Although the quality of those plans had reached the level of minimum adequacy by 1979, the long delays in preparing and reviewing them remained constitutionally deficient, (A 192-3). The testimony of Dr. Ritterbusch, quoted above, also illustrates the catalytic role of plaintiffs' suit in improving patient treatment plans. In the visitation, telephone and mail category, defendants significantly modified their mail policy over the course of the litigation. Prior to 1977, all incoming mail was opened and checked for contraband outside the patient's presence, while all outgoing mail, except that addressed to "any official, lawyer, etc." was censored by hospital staff, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 924, n. 55 (A 198, n. 55). Defendants altered their policy to permit all outgoing mail to remain sealed and to allow some incoming mail to be inspected only in the patient's presence, *Eckerhart* v. *Hensley, supra,* 475 F. Supp. at 924 (A 197-8). Despite these changes, defendants' visitation and telephone policies still required court-ordered relief.

In addition to the court-ordered relief, plaintiffs' lawsuit also prompted defendants to remedy various challenged practices at the hospital. The catalytic effect of a lawsuit is an appropriate basis for awarding fees pursuant to the Fees Act. The Congressional Committee Reports on the Fees Act cite with approval several cases in which the catalytic effect of the lawsuit was held

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[20] Although the attorneys' fee award here applied only to the inadequate treatment claim which comprised Count I of plaintiffs' original complaint, it should be noted that the issues raised in Count II and III of that complaint were also resolved in plaintiffs' favor. *See, supra,* pp 1-2.

to constitute a sufficient basis for awarding attorneys' fees, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976). One of those cases, *Parham* v. *Southwestern Bell,* 433 F.2d 421 (8th Cir. 1978), was a Title VII suit in which the plaintiffs were seeking attorneys' fees. The Eighth Circuit held that although the requested injunction had not been issued, attorneys' fees should be awarded because plaintiffs' "lawsuit acted as a catalyst which prompted the appellee to take [remedial] action . . . seeking compliance with the requirements of Title VII," *id.* at 429-30. Furthermore, as this Court has noted in several recent cases, the legislative history of the Fees Act indicates that a person may be a " 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits,' " *Hanrahan* v. *Hampton,* 446 U.S. 754, 756-7 (1980). (quoting H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976)); *Maher* v. *Gagne,* 448 U.S. 122, 129 (1980). "Thus, for example, 'parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief,' " *Hanrahan* v. *Hampton, supra,* 446 U.S. at 757 (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976)).

As demonstrated above, the present litigation similarly caused defendants to remedy inadequate treatment conditions in several key areas.[21] The chronological history of this litigation plainly reveals the catalytic effect of the suit, but there is also direct evidence from defendants' own witness as to the causal relationship between the lawsuit and their remedial actions. *See, supra* at 20.

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[21] Because evidence of any "catalytic effect" is often in the control of defendants, some courts review the "chronological course of events" in the law suit to discern such effect, *Nadeau* v. *Helgemoe,* 581 F.2d 275, 281 (1st Cir. 1978). *See* also, *Ross* v. *Horn,* 598 F.2d 1312, 1322 (3rd Cir. 1979), *cert. denied,* 448 U.S. 906 (1980).

When the court-ordered relief won by plaintiffs is combined with the remedial actions caused by their suit, the conclusion is inescapable — plaintiffs prevailed on practically every claim advanced. That conclusion is graphically demonstrated by the chart set forth below which compares the inadequate treatment allegations made in the 1977 amended complaint with the relief obtained through court order or remedial action. Since the plaintiffs here prevailed on virtually every material claim, the proportionality issue — with its assumption that at least to some extent plaintiff did not prevail — is not presented by the facts in this case.

The extensive success obtained by plaintiffs goes far to explain defendants' course of action with respect to the district court fees decision. While plaintiffs undeniably had the burden of proving their entitlement to fees and the scope of the award, defendants did not meet their responsibility to object with specificity to the compensable hours claimed by plaintiffs.[22] Defendants had ample opportunity through discovery and the hearing to produce evidence, if any, on the appropriateness of their proposed proportionality theory. Months after plaintiffs had requested attorneys' fees, the court in June, 1980, granted defendants' motion to reopen discovery on the fees issue. However, between July and the hearing in mid-October, defendants did not pursue a single discovery device to develop evidence challenging or rebutting plaintiffs' request for fees. Similarly, at the hearing, defendants offered no evidence to demonstrate to the district court those claims, if any, on which plaintiffs did not prevail. Instead they chose to rely simply on counsel's argument for an automatic, mathematical reduction

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[22] Defendants did argue for an across-the-board reduction in fees based on a mathematical formula. In their memo in opposition to a fee award they suggested that "the hours claimed by the plaintiffs . . . should . . . reduced by seventy percent, to reflect, in some degree, the extent to which they prevailed." (Memo. opp. fees at 31.)

based on claims not resulting in court-ordered relief. Not surprisingly then, the district court concluded, on the basis of its own experience with the interrelated issues in the suit, that plaintiffs had not requested attorneys' fees for any time unreasonably spent on clearly meritless or wholly unrelated claims.

Comparison of Relief Sought with Relief Obtained

Claims [as alleged in plaintiffs' complaint, 8/3/77 (A71-80)]	**Constitutional Violation** * * * **Court-ordered relief**	**Remedial action undertaken by defendants**	**No relief**
I. Physical Environment (¶ 26)	1) Climate control 2) Inadequate privacy-bathrooms and lavatories 3) Inadequate sleeping facilities 4) Inadequate furnishings and space for individual belongings * * * Extensive renovation plan was ordered to address all of the above physical inadequacies		

Claims	Constitutional Violation * * * Court-ordered relief	Remedial action undertaken by defendants	No relief
II. Staffing (¶ 17)		Material increases in staff explicitly in response to the lawsuit	
III. Individual treatment plans (¶ 18) A. Initial preparation	A. Impermissable delay in initial plans * * * A three-part specific time-table was ordered with the designation of a Building Monitor to insure compliance	1) Operating Regulation #149 which required the use of plans, and 2) Increased personnel and staff to implement plans	

Claims	Constitutional Violation * * * Court-ordered relief	Remedial action undertaken by defendants	No relief
B. Adequate review of patients' progress	B. Failure to make periodic reviews of the plans * * * Plans were to be reviewed formally every 90 days and Building Monitor designated to insure compliance		
IV. Least Restrictive Environment (¶ 19, 24-25)	Long delay between determination that patient was ready to transfer and actual transfer held to be inconsistent wth due process		

Claims	Constitutional Violation * * * Court-ordered relief	Remedial action undertaken by defendants	No relief
IV. Least Restrictive Environment (¶ 19, 24-25)	* * * Minimum timetable established for transfer for patients; Included within the relief ordered on the least restrictive environment issue, specific provision was made for the identification and transfer of mentally retarded patients[23]		

[23] Regarding the special education issue, the court did not address that issue specifically, and so relief was neither denied nor obtained.

Claims	Constitutional Violation * * * Court-ordered relief	Remedial action undertaken by defendants	No relief
V. Visitation, mail and telephone			
A. Visitation (¶ 27)	A. Held to be overly restrictive * * * Policy ordered to be modified, and part of the physical renovations included construction of new visiting room		
B. Mail and telephone (¶ 28)	B. Telephone policy overly restrictive * * * Policy ordered to be liberalized	Mail policy restrictions liberalized during course of lawsuit	

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Claims	Constitutional Violation * * * Court-ordered relief	Remedial action undertaken by defendants	No relief
V. Visitation, mail and telephone			
A. Visitation (¶ 27)	A. Held to be overly restrictive * * * Policy ordered to be modified, and part of the physical renovations included construction of new visiting room		
B. Mail and telephone (¶ 28)	B. Telephone policy overly restrictive * * * Policy ordered to be liberalized	Mail policy restrictions liberalized during course of lawsuit	

Claims	Constitutional Violation * * * Court-ordered relief	Remedial action undertaken by defendants	No relief
VI. Seclusion and Restraints A. Seclusion (¶ 21-23)	1) Seclusion for medical purposes: defendants' practices, as contrasted with their policy, were violative of plaintiffs' rights * * * Specific guidelines and procedures were ordered to insure that defendants' practices complied with established policies * * *		

Claims	Constitutional Violation * * * Court-ordered relief	Remedial action undertaken by defendants	No relief
B. Medication (¶ 20)	2) Seclusion for disciplinary purposes: held to require minimal due process procedures which were found to be non-existent * * * Minimum due process procedures were ordered to be implemented		B. Both as to insufficient staff to administer and over medication claim

II. The District Court Exercised Its Discretion In Consonance With The Standard Prescribed By Congress In The Fees Act When It Based Its Fee Award On The Ultimate Results Achieved In The Case As A Whole And Rejected The Mechanical, Mathematical Approach Urged By The Defendants.

A. The Fees Act authorizes attorneys' fees to prevailing parties for all time reasonably expended on a matter and rejects a proportional fee analysis.

The Fees Act is a broad Congressional charter authorizing courts to award the prevailing civil rights litigant "a reasonable attorney's fee as part of the costs." Accompanying that statute is a legislative history in which Congress was able to provide the courts with more detailed and thorough guidance on the scope of the fee-shifting remedy. The legislative history of the Fees Act is remarkably rich and includes both a Senate Report, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976) and a House Report, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976). Both reports have been authoritatively cited by this Court. *See Maher* v. *Gagne,* 448 U.S. 122 (1980); *Hanrahan* v. *Hampton,* 446 U.S. 754 (1980); *Hutto* v. *Finney,* 437 U.S. 678 (1978).

In the legislative history of the Fees Act, Congress explicitly stated the appropriate standard for computation of a reasonable attorney's fee: "[i]n computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, '*for all time reasonably expended on a matter,*' " S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (quoting *Davis* v. *County of Los Angeles,* 8 E.P.D. ¶9444 (C.D. Cal. 1974)) (emphasis added). Congress further indicated that the standard had been correctly applied in *Davis* v. *County of Los Angeles, supra,* 8 E.P.D. ¶9044 and *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974).

Those cases establish that proper application of the "all time reasonably expended" standard does not permit proportioning

the fee award to only winning claims. In *Davis,* the plaintiffs had prevailed in a Title VII class action suit against the Los Angeles County fire department and thereafter moved for an award of attorneys' fees under 42 U.S.C. §2000e-5(f). After considering defendants' proportionality argument, the court concluded that it was "not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues . . . or upon which plaintiffs ultimately did not prevail," 8 E.P.D. at 5049. Rather, the court looked to the "excellent results" achieved for plaintiffs and their represented class, *id.* The final judgment entered on the merits had provided that until the percentage of blacks and Mexican-Americans in the fire department workforce equalled that in the population of Los Angeles County, forty per cent of all new firemen hired by the county had to be black and Mexican-American, *id.* at 5048. On the basis of the significant results obtained for their clients, the court held that plaintiffs' counsel were entitled to a statutory fee award "for all time reasonably expended in pursuit of the ultimate result achieved," *id.* at 5049. To the *Davis* court, "reasonably expended time" could include certain limited hours spent on unsuccessful issues of law and fact.

The *Stanford Daily* attorneys' fees decision explicitly approved by Congress also rejected a proportionality theory, *Stanford Daily* v. *Zurcher, supra,* 64 F.R.D. at 684. After the plaintiffs in *Stanford* had obtained a declaratory judgment, they unsuccessfully sought injunctive relief against further unwarranted searches of individuals not suspected of any crime. When they later moved for attorneys' fees, the court refused to deduct from the fee computation hours expended on the unsuccessful motion. Instead, it adopted the position that while fees would be denied for "clearly meritless claims," they should be granted "for legal work reasonably calculated to advance . . . [the] clients' interest," *id.* The *Stanford* court concluded that, although the plaintiffs did not secure the full injunctive relief re-

quested, they did obtain "a significant concession from defendants as a result of their motion" and "[i]n the process . . . substantially advanced their clients' interest," *id.* Thus, the standard applied in *Stanford Daily* to determine a fee award would allow compensation for hours spent on issues which did not result in court-ordered relief but did nevertheless contribute to the client's success.

The endorsement of *Davis* and *Stanford Daily* in the legislative history of the Fees Act establishes that Congress anticipated and rejected the proportionality theory advocated by defendants. Defendants seek to obfuscate that clear expression of Congressional intent by suggesting that the *Davis* and *Stanford Daily* cases are cited in the legislative history to support the proposition that a plaintiff need not recover damages in order to prevail for attorneys' fees purposes, (Brief for Petitioners at 46.) Similarly, one *amicus curiae* has argued that the *Davis* court was saying that a party could be considered prevailing even though limited time had been spent on issues not resulting in relief, (Brief for Amicus Curiae, Equal Employment Advisory Council at 11-12 n. 9.) Both characterizations are patently incorrect.

In the legislative history of the Fees Act, the *Davis* and *Stanford Daily* cases are cited with approval in the section dealing with the *amount* of the fee award, not in the earlier section concerning *eligibility* for fees as a prevailing party, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6-7 (1976). The *Davis* opinion also clearly separated the threshold question of prevailing party status from questions regarding the amount of the fee award. After finding that plaintiffs were the prevailing party, the *Davis* court addressed and rejected two arguments seeking to reduce the amount of the fee — the public interest discount and the proportionality theory, *Davis* v. *County of Los Angeles, supra,* 8 E.P.D. at 5048-9. With regard to the *Stanford Daily* decision, Congress in the legislative history cited the exact page on which

the *Stanford Daily* court had considered other decisions using the proportionality theory and explicitly refused to adopt their approach, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (citing *Stanford Daily* v. *Zurcher, supra,* 64 F.R.D. at 684). Furthermore, since the prevailing party or fee eligibility issue had been answered in an earlier opinion, *Stanford Daily* v. *Zurcher,* 366 F. Supp. 18, 20-21 (N.D. Cal. 1973), *aff'd* 550 F. 2d 464 (9th Cir. 1977), the *Stanford Daily* decision cited in the legislative history did not even address that issue.

Congress in the Fees Act plainly did not intend that a fee award would be reduced by the time spent on every claim which did not result in relief. Instead, Congress singled out *Davis* and *Stanford Daily* as correct applications of the reasonable attorneys' fee standard and thus endorsed their fee computation analysis. That fee computation analysis involved two primary steps. First, the court determined who was the prevailing party eligible for a reasonable attorney's fee. Second, the court looked at the case as a whole to determine what time was reasonably expended on the matter. Legal services for a prevailing party were reasonably expended unless: (a) they were spent pursuing claims "in bad faith" which could entitle an opposing party to fees, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976); (b) they were spent on "clearly meritless claims," *Stanford Daily* v. *Zurcher, supra,* 64 F.R.D. at 684; or (c) they were spent on claims so wholly unrelated, causes of action so clearly separable, or issues so distinguishable and discrete that, looking at the case as a whole, the time involved in preparing, proving, or litigating them had in no way contributed to the "ultimate result achieved," *Davis* v. *County of Los Angeles, supra,* 8 E.P.D. at 5049; *Stanford Daily* v. *Zurcher, supra,* 64 F.R.D. at 684.[24]

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[24] That method of analyzing reasonably expended time recognizes that, between clearly meritless claims and relief-obtaining claims, a prevailing party would also properly receive fees for time spent pursuing other related claims which did not provide the precise basis for relief but nevertheless contributed to the overall accomplishments of the suit.

The fee analysis made by the district court in the present case was fully consistent with the standard and guidelines prescribed by Congress in §1988 and its legislative history. The court first determined that plaintiffs were the prevailing party. In fact, the court found that the relief obtained by plaintiffs at trial was sufficient in itself to make them prevailing parties and to obviate the necessity of examining any issues resolved prior to trial. Since there were no special circumstances rendering a fee award unjust, the plaintiffs were entitled to a reasonable attorneys' fee.

With the threshold question of prevailing party status answered, the court then proceeded to consider the amount of a reasonable fee. The defendants had argued that the amount of the fee should be reduced by an automatic percentage reflecting the claims on which plaintiffs failed to obtain court-ordered relief. Despite the contrary characterization of their position offered to this Court, (Brief for Petitioners at 47-48), defendants contended before the district court for precisely such a mathematical rule. In their memorandum submitted to the district court on the fees issue, defendants urged that "[w]hat is relevant is what the plaintiffs actually accomplished in this litigation. That accomplishment can *only* be measured by reference to the *opinion and judgment* of this Court, taken in context with the length and duration of this lawsuit and the factual allegations which the lawsuit has represented," (Memo. opp. fees at 11-12) (emphasis added). Defendants then argued "that the total failure of the plaintiffs to secure any relief whatsoever in the area of staff fully justifies at least a *sixty percent reduction* in the hours claimed by plaintiffs for attorneys' fees purposes," *id.* at 30, (emphasis added). Later, in that same memorandum, defendants again contended that "[t]aking into account the limited success of the plaintiffs in this litigation, . . . the hours claimed by the plaintiffs . . . *should be reduced by seventy percent,* to reflect, in some degree, the extent to which they prevailed," *id.* at 31, (emphasis added).

The district court considered defendants' mathematical approach comparing total issues with issues actually prevailed on at trial and found that such an approach ignored the interrelated nature of issues and the extent to which a party could prevail on various issues, (Pet. App. B at A 7-8). Instead, the court used the *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974) factor of "results obtained" to analyze the ultimate accomplishments made in the case as a whole, (Pet. App. B at A 16). In the seamless fabric of those accomplishments — the vindication of plaintiffs' constitutional rights and the accompanying changes in their treatment environment — there was no time unreasonably spent on clearly meritless or wholly unrelated claims. By looking at the case as a whole and evaluating claims within the context of the ultimate results achieved, the district court exercised its discretion in the manner intended by Congress in the Fees Act.

B. The Circuit Courts giving due consideration to the express instructions of Congress in the Fees Act have awarded attorneys' fees for all time reasonably expended on a matter and rejected a proportional fee analysis.

Because of Congress' exclusive authority to allow attorneys' fees, the expressions of legislative intent and purpose recorded in the statutory history of the Fees Act deserve particular weight and attention. The Committee Reports on the statute show that its enactment was a direct response to the Supreme Court decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 2 (1976). In *Alyeska*, the Court had reaffirmed the "American Rule" that each litigant must pay his own attorney's fees in the absence of specific Congressional authorization shifting those fees to the unsuccessful party. Congress had reserved for itself the power "to carve out specific exceptions to the general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. §1923," *id.* at 269. Finding that the rejection of a

"private attorney general" rule in *Alyeska* had limited the capacity of ordinary citizens to protect their civil rights, Congress carved out just such a special exception in the Fees Act and authorized fee-shifting in §1983 actions and other civil rights litigation, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 2 (1976).

The *Alyeska* decision recognized the unique authority of Congress not only to provide for awards of attorneys' fees but also to determine the scope and standards for those awards. "[I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine," *id.* at 262. In the legislative history of the Fees Act, Congress went to great lengths to define the standard for determining the amount of a reasonable attorneys' fee and to illustrate its proper application. Since the power to allow fee awards and determine their scope lies within the special province of the legislative branch, the guidance provided by Congress in the statutory history of its attorneys' fees acts should receive extensive consideration from the courts.

Every circuit court giving due weight to the expressions of Congressional intent in the legislative history of the Fees Act has rejected a proportionality formula. To the Sixth Circuit in *Northcross* v. *Board of Education of Memphis City Schools,* 611 F. 2d 624, 636 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), Congress had mandated in the statutory history of the Fees Act that a prevailing party should receive attorneys' fees "for all time reasonably expended on a matter." That mandate was especially compelling because "the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees," *id.* at 632. On the basis of that Congressional command, the Sixth Circuit in *Northcross* reversed a district court applying the same automatic percentage reduction as advocated by defendants here. This Court then denied a petition for certiorari on that issue, 447 U.S. at 911.

The standard prescribed by Congress for making awards under the Fees Act also provided the basis for the Eighth Circuit's decision in *Brown* v. *Bathke,* 588 F. 2d 634 (8th Cir. 1978). To the *Brown* court, when the Senate Committee cited the correct application of that standard in *Davis* v. *County of Los Angeles, supra,* 8 E.P.D. at 5049, Congress had effectively addressed and resolved the question of what time should be considered reasonably expended, *Brown* v. *Bathke, supra,* 588 F. 2d at 637. Reversing the district court's decision which limited the fee award to only that time spent on the claim garnering court-ordered relief, the Eighth Circuit held that, so long as the time was not spent on clearly frivolous or manufactured issues, compensation for time spent on "a claim which is reasonably calculated to advance a client's interest should not . . . be denied solely because that claim did not provide the precise basis for the relief granted," *id.* The *Brown* decision is still cited with approval by the Eighth Circuit, *Planned Parenthood Assoc.* v. *Ashcroft,* 655 F. 2d 848 (8th Cir. 1981); *Reproductive Health Services* v. *Freeman,* 614 F. 2d 585 (8th Cir. 1980); *Crain* v. *City of Mountain Park,* 611 F. 2d 726 (8th Cir. 1979).

The most dramatic response to the Congressional mandate on the Fees Act came from the Tenth Circuit. After the Act was passed and the statutory history considered, the Tenth Circuit reversed its position on the proportionality theory, holding that "[a] technical dissection of the course of litigation and a mechanical proportionate reduction of the total fee is not in keeping with either the express intent of Congress or the broad remedial purposes of the Civil Rights Acts," *Gurule* v. *Wilson,* 635 F. 2d 782, 793-4 (10th Cir. 1980).[23] The Tenth Circuit

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[23] Although the *Gurule* court suggested on rehearing that a fee award might be proportioned where the plaintiff had failed to prevail on a substantial separate issue, the Tenth Circuit did not find such a situation in *Littlefield* v. *Deland,* 641 F. 2d 729 (10th Cir. 1981) where it found that detention in a "strip cell" without notice or hearing violated procedural due process requirements, but rejected the claim that a "strip cell" was *per se* unconstitutional.

recently affirmed its rejection of a proportionality formula in *Littlefield* v. *Deland,* 641 F. 2d 729 (10th Cir. 1981), concluding that attorneys' fees under §1988 may be awarded for work on "issues of fact or law upon which plaintiff ultimately did not prevail so long as they were reasonably calculated to promote the client's interest," *id.* at 733.[26]

The express Congressional command to award fees under §1988 for all time reasonably expended and to reject the proportionality theory has proved unmistakably clear to those courts giving due attention to the legislative history of the Fees Act. In-

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[26] The Congressional guidelines provided in the Fees Act and its legislative history also led the Fifth Circuit to reject a proportionality theory and award fees for all time reasonably expended, *Jones* v. *Diamond,* 636 F. 2d 1364 (5th Cir. 1981). Noting the overlapping and intertwined nature of issues in an institutional conditions suit, the court refused to proportion the fee award to only those claims resulting in a judgment. In addition to the Sixth, Eighth, Tenth, and Fifth Circuits, panels in three other circuits have also declined to limit fee awards to claims resulting in relief. In the Seventh Circuit, see *Sherkow* v. *State of Wisconsin,* 630 F. 2d 498 (7th Cir. 1980). *Contra, Muscare* v. *Quinn,* 614 F. 2d 577 (7th Cir. 1980). For the Ninth Circuit, see *Manhart* v. *City of Los Angeles, Department of Water, Inc.,* 652 F. 2d 904 (9th Cir. 1981); *Seattle School District No. 1* v. *State of Washington,* 633 F. 2d 1338 (9th Cir. 1980). *Contra, Sethy* v. *Alameda County Water District,* 602 F.2d 894 (9th Cir. 1979) *cert. denied,* 444 U.S. 1046 (1980). In the First Circuit, see *Lamphere* v. *Brown University,* 610 F. 2d 46 (1st Cir. 1979). *Contra, Nadeau* v. *Helgemoe,* 581 F. 2d 275 (1st Cir. 1978). Although the court in *Lamphere* noted that time spent on a truly fractionable claim was not compensable, it held that the fee award properly compensated time spent on an issue not resulting in relief when that issue was "all part and parcel of one matter," *Lamphere* v. *Brown University, supra,* 610 F. 2d at 47. In *dicta,* the District of Columbia Circuit in *Copeland* v. *Marshall,* 641 F. 2d 880, 892 n. 18 (D.C. Cir. 1980), quoted with approval the holding in *Lamphere.* Neither the Fourth, the Second, nor the newly created Eleventh Circuit has apparently considered the question of whether the Fees Act permits a proportionality formula, but the Second Circuit has declined to apply such a formula in other complex federal litigation, *Seigal* v. *Merrick,* 619 F. 2d 160 (2nd Cir. 1980).

deed, that Congressional command is so clear that only one circuit has consistently applied a proportionality analysis to fee awards under §1988, and even that circuit in *Hughes* v. *Repko*, 578 F. 2d 483, 486 (3rd Cir. 1978) reversed the lower court for imposing a mechanical, mathematical reduction such as defendants advocated here. *See e.g., Walker* v. *Robbins Hose Co. No. 1, Inc.*, 622 F. 2d 692 (3rd Cir. 1980). As the Sixth Circuit noted, the Fees Act is a "rare statute with sufficient legislative history to provide '[a] clear-cut indication that Congress considered [many of] the exact problem[s] with which we are now confronted and provided an express indication as to how the general language of the 1976 Statute was intended to be applied,' " *Northcross* v. *Board of Education of Memphis City Schools, supra,* 611 F. 2d at 633 (quoting *Seals* v. *Quarterly County Court,* 562 F. 2d 390, 394 (6th Cir. 1977)). In light of Congress' exclusive authority to allow attorneys' fees, the *Northcross* court and others have felt obligated to apply the standards and guidelines prescribed in the legislative history of the Fees Act. The fee award made by the district court in the present case was fully consistent with those same legislative standards and guidelines.

III. Congress Found That Strong Public Policy Considerations Required A Standard Which Awards Attorneys' Fees For All Time Reasonably Expended On A Matter.

Reflected in the legislative history of the Fees Act are matters of public policy which Congress considered in determining the standard to be used in awarding reasonable attorneys' fees under the Civil Rights Attorneys' Fees Awards Act. Congress concluded that those policy considerations necessitated an attorneys' fees standard which will promote vigorous private enforcement of civil rights laws, encourage compliance with both the letter and the spirit of professional ethical obligations, and facilitate judicial economy and efficiency. The standard of

awarding attorneys' fees for all time reasonably expended, as set forth by Congress in the legislative history of the Fees Act, would foster each of these policy considerations. The proportionality formula advocated by defendants, on the other hand, would effectively undermine those same public goals.

Congress enacted the fee-shifting provisions of §1988 specifically to insure compliance with and vigorous private enforcement of civil rights laws, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976). After conducting hearings on fee awards, Congress found that such awards were "an integral part of the remedies necessary to obtain compliance" with civil rights laws, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976). Without the prospect of securing attorneys' fees from an unsuccessful party, private attorneys and the over-extended civil rights bar could not feasibly represent ordinary citizens of ordinary means in complex civil rights litigation, *id.* at 3. The relationship between civil rights enforcement and attorneys' fees has depended not simply upon the availability of fees but also upon the scope of the fee award. Unless the standard for determining a reasonable fee award under §1988 is applied so as "to attract competent counsel in cases involving civil and constitutional rights," the private enforcement of those rights would be neither vigorous nor effective, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976). The standard of awarding fees for all time reasonably expended would treat civil rights attorneys like attorneys with fee-paying clients and compensate them for those legal services reasonably calculated to advance their clients' interests. By contrast, the proportionality formula would place so much of the litigation risk on attorneys that competent counsel would soon be driven out of civil rights practice. The Congressional purpose of promoting competent and aggressive representation in civil rights litigation would thus be undercut by a theory of proportional fee computation. "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the tradi-

tionally effective remedy of fee shifting in these cases," S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

Congress was also keenly aware that a proportionality formula would discourage precisely the zealous representation which the Fees Act seeks and the Code of Professional Responsibility requires from attorneys. In *Stanford Daily* v. *Zurcher, supra,* 64 F.R.D. at 684, cited approvingly by Congress, the court recognized that civil rights attorneys are often "working in new or changing areas of the law." When their legal work is reasonably calculated to advance their clients' interests, their efforts should not go uncompensated simply because they failed "to divine the exact parameters of the courts' willingness to grant relief," *id.* Ethical considerations in the Code of Professional Responsibility provide that "[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law," EC 7-19. Especially in the area of civil and constitutional rights where the bounds of the law are often unclear and uncertain, the Code of Professional Responsibility maintains that "a lawyer should resolve in favor of his client" any doubts as to the bounds of the law, EC 7-3. A proportionality theory which compensates civil rights attorneys only for hours spent on winning issues would discourage aggressive advocacy exploring the cutting edge of the law. The Sixth Circuit explained why the proportionality formula violates the spirit of the ethical code and the Fees Act:

> [I]t would hardly further our mandate to use the 'broadest and most flexible remedies available' to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous positions on their clients' behalf that is possible in good faith.

Northcross v. *Board of Education of Memphis City Schools, supra,* 611 F. 2d at 636.

Even outside the context of civil rights litigation, the Second Circuit in a stockholder's derivative suit recognized that a proportionality theory would deter vigorous, professional lawyering. "Lawyers for plaintiffs and objectors in derivative or class actions, no less than other litigators, must evaluate, accept and prosecute suits on the basis of the entire spectrum of theories that show early promise of vindicating their clients' rights," *Seigal* v. *Merrick, supra,* 619 F. 2d at 164-5. Rewarding only the pursuit of successful theories would "invite overly conservative tactics and even prohibit some high-risk but deserving actions entirely," *id.* at 164. That assessment of the impact of a proportionality rule in corporate and securities cases is particularly instructive in light of Congress' directive that fee awards under §1988 should "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases," S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976). Obviously, if the proportionality formula would discourage aggressive advocacy by attorneys with well-financed clients, it would virtually paralyze civil rights lawyers representing poor people. Certainly, Congress never intended the Fees Act to have a chilling effect on civil rights litigation.

In contrast to the dampening influence of a proportionality theory, the standard prescribed by Congress — awarding fees for all time reasonably expended on a matter — would promote vigorous civil rights advocacy within the bounds of professional ethical obligations. By endorsing the application of that standard in *Davis* and *Stanford Daily,* Congress also built into the standard precautions against any windfall to civil rights attorneys. Under that standard, time spent on clearly meritless or wholly unrelated claims is not reasonably expended and therefore not compensable. Civil rights attorneys seeking an award under the Fees Act would bear the risk of pleading clearly meritless or wholly unrelated claims, but they would not be discouraged from pursuing meritorious, interrelated claims which simply might not result in court-ordered relief.

A proportionality theory finally would wreak havoc on the interests of judicial economy and efficiency. In fact, adoption of the proportionality formula would turn the attorneys' fees hearing into a massive inquiry likely to dwarf even the trial on the merits. The practical difficulties of applying a proportionality formula would be overwhelming, especially in a complex civil rights case composed of interrelated and intertwined claims. Applying a proportionality formula would require plaintiffs' counsel and the district court to identify the time spent preparing and litigating each separate claim. A brief example from the present case illustrates the problems inherent in such a formula. At the trial on the merits in this case, plaintiffs on May 9, 1979, cross-examined Dr. Ritterbusch, the Superintendent of Fulton State Hospital (A 4). As superintendent, his testimony touched on all major issues in the case. The time records of plaintiffs' counsel, Mr. Berkowitz, show that on May 8, 1979, he spent 5½ hours on trial preparation and 7 hours in trial on May 9, 1979 (A 218). How is that time to be allocated to each issue on which Dr. Ritterbusch testified? Is plaintiffs' counsel to keep time records so detailed that they show 4½ minutes spent preparing for cross-examination on the overmedication issue and 27¼ minutes on treatment plans? Obviously, a proportionality theory would either drown the parties and the trial court in an ocean of records and testimony or force the court to grab the frayed lifeline of an automatic, mechanical percentage reduction for each claim not resulting in court-ordered relief. Neither approach is within the scope of Congressional intent in the Fees Act.

The standard prescribed by Congress in the Fees Act and its legislative history is a far more sensitive and efficient method for determining a reasonable fee award. As the Fees Act itself requires, the Congressional standard relies on the discretion of the trial court familiar with the case as a whole. The trial court must use its discretion to determine prevailing party status, to consider any special circumstances mitigating against attorneys'

fees, and to identify any bad faith or clearly meritless claims. In addition, when a prevailing party has not obtained or prompted relief on a particular claim, the Congressional standard authorizes the trial court to use its discretion in evaluating the claim. Under that standard, the court is not locked into any rigid, automatic fee reduction or bogged down in endless time analyses. Rather, the court must exercise its discretion within a framework assessing whether the time spent prosecuting that claim in any way contributed to the ultimate results achieved. If it finds such a relationship, then the time is properly compensable under the Fees Act.

Defendants, in the final portion of their brief, urge adoption of a standard principle to guide lower federal courts in fashioning fees awards under §1988. The appropriate standard and the method for applying it have already been articulated by Congress in the Fees Act and its legislative history. In making its fee award in the present case, the district court exercised its discretion in consonance with the standard and method of analysis intended by Congress.

CONCLUSION

The judgment of the Court of Appeals, affirming the decision of the District Court assessing reasonable attorneys' fees against defendants, should be affirmed in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,
Petitioners,

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1244

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,
Petitioners,

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

INTEREST OF AMICUS CURIAE

The American Bar Association is a voluntary, national membership organization of the legal profession. Its more than 280,000 members come from every state, territory and the District of Columbia. Since its inception over 100 years ago, the Association has taken an active interest in the improvement of the administration of justice.

As part of its activities to strengthen the legal system, the Association has frequently opposed limitations on the public's access to legal resolution of conflicts and enforcement of legal rights. In this regard, the Association's House of Delegates has voted against unreasonable limitations on awards of attorney's fees, recognizing that such restrictions inhibit individuals seeking to redress their grievances through our administrative and judicial processes. Similarly, the Association has supported the principle that reasonable attorney's fees should more frequently be included as costs recoverable by prevailing parties when that would facilitate the pursuit of legal rights and remedies.

The Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988 (1976), was designed to encourage victims of civil rights violations to seek judicial relief by awarding attorneys' fees to the "prevailing party." The Association, in recognition of the importance of access to justice, participates as *amicus curiae* [1] herein on behalf of Respondent to urge this Court to read the definition of "prevailing party" in a manner which will ensure that Congress' important objective is not frustrated.

The Association's interest extends beyond its articulated positions on fee awards. The issue in this case touches upon key aspects of the duties and responsibilities of lawyers to clients and to our legal system. The Court's decision will have a significant impact on the ability of civil rights attorneys to comply with Canon 7 of the Code of Professional Responsibility, which requires zealous advocacy on behalf of clients and assistance to our adversarial system of justice.

INTRODUCTION

As the rights and responsibilities of individuals have increasingly been defined in legal terms, legal assistance

[1] Copies of letters indicating the parties' consent to the Association's participation have been filed with the Clerk of the Court.

in coping with the complex web of statutes, rules and regulations has become of greater importance for persons at all levels of the economic ladder. In recognition of this reality, Congress, in enacting the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988 (1976) (hereafter "Fees Act"), sought to provide access to the courts for persons who would privately enforce their rights under a myriad of federal civil rights statutes. "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 94-1011, 94th Cong., 2d Sess., at 2 (1976) (hereafter "S. Rep."). The Fees Act was promulgated at least in part because a "vast majority of the victims of civil rights violations [could not] afford legal counsel," and, therefore, were "unable to present their cases to the courts." H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 1 (1976) (hereafter "H. Rep."). Moreover, Congress recognized that "[u]nless the judicial remedy is full and complete, it [would] remain a meaningless right." H. Rep. at 1.

The question here presented is whether the attorneys' fees should be reduced automatically so as to reflect the number of issues on which the plaintiff did not prevail before the trial court. The Association believes that to require such automatic proportionalization in all cases would not only have a general chilling effect on the vigorous litigation of civil rights issues, but also would particularly chill the assertion of rights of persons about whom the 94th Congress was most concerned—the victims of civil rights transgressions with "little or no money with which to hire a lawyer." S. Rep. at 2.

The District Court held that the relief obtained by plaintiffs at trial was substantial and that they did not need to meet success on every claim asserted to be considered prevailing parties for the purpose of an award

of attorneys' fees. Judge Hunter rejected petitioner's mechanical approach for the determination of attorneys' fees, and instead, exercised his judicial discretion and awarded fees based upon the traditional factors. For the reasons set forth herein, the Association supports the interpretation of the Fees Act by the District Court.

SUMMARY OF THE ARGUMENT

The legislative history of the Fees Act establishes Congress' remedial intent and requires a broad interpretation of what constitutes a "prevailing" plaintiff. Therefore, the Association agrees with the District Court that plaintiffs need not succeed on all the issues they present in order to be deemed prevailing parties for the purpose of the Fees Act. Once having determined that plaintiffs are prevailing parties, it is within the discretion of the district court to determine, in light of all relevant circumstances, reasonable attorneys' fees. As explained below, allowance may reasonably be made in some but not other circumstances for the fact that a plaintiff has not prevailed on some elements of his case.

Furthermore, the Code of Professional Responsibility requires lawyers to zealously represent their clients within the bounds of the law. A determination that fees awarded under the Fees Act should always be proportionate to the number of issues on which a plaintiff prevails would undermine the intent of Congress to ensure effective advocacy of civil rights issues.

ARGUMENT

I. The Fees Act Does Not Require That Attorneys' Fees Be Proportioned To Reflect The Extent To Which Plaintiffs Have Prevailed On The Merits Of Their Lawsuit.

Under the Fees Act attorneys' fees may be awarded at the discretion of the court to "prevailing parties." Congress intended that the term "prevailing parties" be

broadly construed. In the Senate's unambiguously articulated view, parties are "prevailing" in a broad range of circumstances that fall short of final judgment on the merits in their favor on all of the issues under consideration:

> In appropriate circumstances, counsel fees under [the Fees Act] may be awarded *pendente lite*. See *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See *Bradley, supra; Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) [*later app.*, 552 F.2d 1239 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977)]. Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970) [*cert. denied*, 401 U.S. 911 (1971)]; *Aspira of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D. N.Y. 1975). [S. Rep. at 5.]

The House of Representatives was equally as explicit in its support of a broad and expansive view of what constitutes a prevailing party:

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen*

County Jail v. *Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker* v. *Matthews*, 411 F. Supp. 1059 (D.D.C. 1976) [*aff'd sub nom.*, *Parker* v. *Califano*, 182 U.S. App. D.C. 322, 561 F.2d 320 (1977)]; *Aspira of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed. *E.g.*, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *see also Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Evers* v. *Dwyer*, 358 U.S. 202 (1958). [H. Rep. at 7.]

The cases cited in the legislative history are important guideposts with regard to Congress' intent on the matter of prevailing parties. In *Bradley*, a desegregation action, the plaintiffs' proposed remedy was rejected by the Court, but they were deemed to have prevailed as to their motion for a broader desegregation remedy. In *Kopet* the plaintiff prevailed for purposes of fee awards although all he did was to expose damaging information through discovery. In *Thomas* plaintiff-intervenors were found to lack standing to sue but were nonetheless deemed to be prevailing parties because they were successful in causing the plaintiffs to institute the lawsuit.

Two other cases cited in the legislative history are of particular significance with regard to the matter before this Court: *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), and *Davis* v. *County of Los Angeles*, 8 E.P.D. (CCH) ¶ 9444 (C.D. Cal. 1974). In *Stanford Daily* the court cited decisions which had granted fees for legal work reasonably

calculated to promote the clients' interest even if unsuccessful and stated that "courts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief." 64 F.R.D. at 684. The *Davis* court, too, spoke to this issue:

> It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all the time reasonably expended in the pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter. [8 E.P.D. (CCH) ¶ 9444, at 5049.]

Nevertheless, petitioners argue that:

> "What is being contested is whether the lower courts should have reduced the attorneys' fees request of plaintiffs by counting only the hours reasonably spent on claims that succeeded." Pet. brief at 13.
>
> "The petitioners . . . recommend the adoption by this court of the principle that an award of attorney's fees under § 1988 should be proportioned to compensate a plaintiff only to the extent that he has prevailed on his substantive claims." Pet. brief at 21-22.
>
> "However, this court should expressly direct that an award of attorney's fees must be proportioned to be consistent with the extent to which a plaintiff has prevailed and only time reasonably expended in support of successful claims should be compensated." Pet. brief at 24.

Although petitioners purport to recommend "a flexible standard," leaving the lower court with "discretion to fashion a reasonable attorney's fee tailored to the results

of each particular case," the court would still be required "to award fees only for time expended by attorneys which was reasonably supportive of claims upon which they prevail." Pet. brief at 47-48.

This position circumscribes the trial courts' discretion. It also represents a departure from the traditional factors applied in determining fees in the federal courts. The District Court, in reaching its decision, properly applied the standards set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). It is noteworthy that one of the twelve factors enumerated in *Johnson* is the result obtained.

Furthermore, Congress instructed the courts "to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." S. Rep. at 3. For this Court to adopt the narrow construction proffered by the petitioners herein is to seriously undercut that important mandate. It would tend "to discourage innovative and vigorous lawyering . . . in changing [areas] of the law." *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). There is no question that the mandate of Congress "is best served by encouraging attorneys to take the most advantageous position on their clients' behalf that is possible in good faith." *Id.*

The positions taken by the courts of appeals are on the whole consistent with these views, although on occasion their abbreviated statements of the test to be applied do not always express it in the same way. Thus, the Ninth Circuit affirmed the decision of the District Court in the *Stanford Daily* case cited above, but nevertheless in several more recent cases approved a statement of the First Circuit that "the amount of attorneys' fees they receive should be based on the work performed on the issues in which they were successful." *Bartholomew* v. *Watson*, 665 F.2d 910, 914 (9th Cir. 1982); *Sethy* v.

Alameda County Water District, 602 F.2d 894, 898 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980), both of which quote *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978).

The First Circuit subsequently explained that "this is not to say that in determining fees the degree of success is not relevant", but that it would not be error to award fees when the "issue was all part and parcel of one matter" and the claims were not "truly fractionable." *Lamphere* v. *Brown University*, 610 F.2d 46, 47 (1st Cir. 1979). The Court of Appeals for the District of Columbia Circuit in *Copeland* v. *Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880, 891-892 (1980), quoted the above language from *Lamphere* as a note to a generalization that "no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail." The court cautions:

> However, it sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentialy the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the "issue was all part and parcel of one matter," *Lamphere* v. *Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979), but only when the claims asserted "are truly fractionable," *id.* [641 F.2d 880, fn. 18.]

The Third Circuit has stated the test in terms of whether a plaintiff who does not prevail on all aspects of his basic claim was "essentially successful" although he "cannot be treated as the prevailing party to the extent he has been unsuccessful." *Hughes* v. *Repko*, 578 F.2d 483, 487 (3rd Cir., 1978).

The Tenth Circuit in *Gurule* v. *Wilson*, 635 F.2d 782, 793-794 (10th Cir. 1980), stated that "technical dissection of the course of litigation and a mechanical pro-

portionate reduction of the total fee is not in keeping with either the express intent of Congress or the broad remedial purposes of the Civil Rights Acts." On rehearing, however, the court added:

> It was not our intention to suggest that a court may never proportionately reduce a requested attorneys fee for time spent on *substantial separate* issues which a plaintiff raises but on which he does not prevail. (Emphasis in original.) [*Gurule* v. *Wilson*, *supra*, 635 F.2d at 794.]

The Fifth Circuit has provided more explanation in coming to the conclusion that while precise proportionalization might not be appropriate, "the degree to which counsel prevailed in the lawsuit" could be "a factor in determining the appropriate amount of attorneys' fees to be awarded." *Jones* v. *Diamond*, 594 F.2d 997, 1027 (5th Cir. 1979), *aff'd on rehearing en banc*, 636 F.2d 1364 (5th Cir. 1981), *cert. denied*, 453 U.S. 950 (1981). Subsequently, after rehearing the case *en banc*, the Fifth Circuit clearly approved an intermediate position:

> In order to represent their clients adequately, attorneys must explore fully every aspect of the case, develop all of the evidence and present it to the court. Time spent pursuing unsuccessful claims that were clearly without merit should be excluded. However the mere fact that the litigants did not succeed in obtaining a judgment on all of the claims asserted does not mean that time spent pursuing these claims should automatically be disallowed. *See Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 684 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547, 98 S. Ct. 1970, 56 L.Ed.2d 525 (1978). Instead the court must consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case. [*Jones* v. *Diamond*, *supra*, 636 F.2d at 1382.]

This recognition of the undesirability of an automatic rule requiring proportionalization seems to be the most reasonable position. It still permits consideration in appropriate circumstances of the fact that a substantial portion of the lawyers' work related to matters as to which he or she was unsuccessful. Lawyers will often and reasonably present issues which are somewhat interrelated because they are not sure which is most likely to be successful; success on any one of them would in substance be "prevailing" in the entire case. On the other hand, to allow fees for the entire litigation to attorneys who raise a vast number of unrelated issues and prevail on only a few could encourage harassment and the time-consuming exploration of issues bordering on the frivolous. An intermediate position would appropriately call in each case for exercise of the discretion of the District Court, which might take into account the time spent on issues upon which plaintiff did not prevail but would not *require* reduction of the fee because of it, proportionately or otherwise.

II. The Attorney Who Acts Ethically To Aggressively Represent A Client Could Be Penalized Under Petitioner's Construction Of The Fees Act.

Under the Code of Professional Responsibility, lawyers are required to represent "a client zealously within the bounds of the law." Model Code of Professional Responsibility Canon 7 (1980), as adopted by the Missouri Supreme Court to govern the conduct of Missouri lawyers. Rule 4, Canon 7, Mo. Supreme Court Rules. This canon grows out of the "professional responsibility a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits" and recognizes that in a "government of laws and not men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to pre-

sent for adjudication any lawful claim, issue or defense." Model Code of Professional Responsibility EC7-1 (1980).

Accordingly, lawyers have a duty to their clients to "urge any permissible construction of the law favorable to [their clients] without regard to [their] professional opinion as to the likelihood that the construction will ultimately prevail" and their "conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or supportable by a good faith argument for an extension, modification or reversal of the law." Model Code of Professional Responsibility EC7-4 (1980).

The lawyer also has a duty to the adversarial system of justice:

> Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of the facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law. Model Code of Professional Responsibility EC7-19 (1980).

Moreover, under the Disciplinary Rules a lawyer may not intentionally "[f]ail to seek the lawful objectives of [a] client through reasonably available means permitted by law. . . ." *Id.* at DR7-101(A)(1) (1980).

A lawyer who is asked to represent an indigent person or one of modest means in vindicating his or her civil rights will often accept the representation at least partly in anticipation of compensation under the Fees Act. As

set forth in Part One of this argument, Congress indisputably intended that the lawyer do so. If the case is novel and complex, it is difficult to predict which of many good faith arguments will ultimately prevail. Therefore, to represent the clients effectively and aggressively, consistent with the attorney's ethical duty, he or she must explore fully every aspect of the case, develop all the evidence and present all supportable issues to the court.

The Second Circuit Court of Appeals aptly made this point:

> Lawyers . . . must evaluate, accept and prosecute suits on the basis of the entire spectrum of theories that show early promise of vindicating their clients' rights. Every lawyer, indeed every judge, has pursued blind alleys that initially seemed reasonable or even professionally obligatory. To reward only the pursuit of a successful theory . . . undercompensates the inevitable exploratory phases of litigation, and may also invite overly conservative tactics or even prohibit some high-risk but deserving actions entirely. [*Seigal* v. *Merrick*, 619 F.2d 160, 164-65 (2d Cir. 1980).[2]

Under petitioner's narrow construction of the Fees Act, the attorney who zealously on behalf of a client presents novel theories for relief and prevails on less than all issues presented would be penalized for acting in conformity with the Code of Professional Responsibility even if the relief gained was substantially what the client set out to accomplish. The attorney's right to compensation should not depend on the success or failure of every claim presented. Such a position could lead an attorney to refrain from—or at least consider refraining from—presenting supportable theories or issues which are novel.

---

[2] This was a stockholders' derivative action, but it is relevant inasmuch as Congress directed that fee awards under the Fees Act should "be governed by the same standards which prevail in other types of equally complex Federal litigation. . . ." S. Rep. at 6.

CONCLUSION

This Court should not construe the Fees Act to require proportioning attorneys fees, as sought by Petitioners. Such a rigid construction is incompatible with Congress' intent and the prevailing law on the subject. Moreover, it would produce a result detrimental to the rights of the clients on whose behalf the legislation was enacted and to our system of justice, which depends on zealous advocacy—particularly in civil rights cases.

Respectfully submitted,

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Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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House Report No. 94-1558, 94th Cong., 2d Sess. (1976) 8, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1244

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,
Petitioners,

vs.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae with the written consent of the parties. Statements of consent have been submitted to the Clerk of the Court. This brief urges that the decision of the Eighth Circuit be reversed, and thus the brief supports the position of the Petitioners.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principle of nondiscrimination and equal employment opportunity.

The issue before the Court involves the proper interpretation of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. One of the statutes covered by Section 1988 is 42 U.S.C. § 1981, which often has been used as a basis for lawsuits challenging employment practices. Moreover, the fee-shifting provisions of Section 1988 and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), contain virtually the same language and have been given similar interpretations by the courts. The lawsuit which gave rise to the instant case did not involve allegations of employment discrimination, but the manner in which Section 1988 is interpreted by the Court in this case will have an impact in the litigation of employment discrimination allegations. Substantially all of the Council's members, or their constituents, are subject to the provisions of Section 1981 and Title VII, and thus these members have a direct interest in the manner in which Section 1988 is interpreted and applied.

Because of its interest in equal employment opportunity issues, the Council has participated as amicus curiae in other cases before this Court. *See, e.g., Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) (involving the proper standard to be used in deciding whether to award attorney's fees to a successful defendant in a Title VII action); *General Building Contractors Association, Inc. v. Commonwealth of Pennsylvania* (U.S. Nos. 81-280, 81-330, 81-331, 81-332 and 81-333) (involving allegations of employment discrimination under Section 1981); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The question presented to the Court involves the proper standard to be used in applying the fee-shifting provision of 42 U.S.C. § 1988 in civil rights actions in which the plaintiffs have prevailed on some claims but have been unsuccessful on others. The issue arises from a lawsuit filed on behalf of patients at the Fulton State Hospital in Missouri challenging the treatment and conditions at that mental health institution. In that suit, the plaintiffs obtained relief with respect to some of the issues they raised and litigated; on a number of other issues, however, the defendants successfully defended their practices as meeting constitutional requirements.

Following entry of the district court opinion on the merits, *Eckerhart v. Hensley*, 475 F. Supp. 908 (W.D. Mo. 1979) (Joint Appendix, 170), the plaintiffs sought an award of attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. In ruling on the fee request, the district court rejected the contention that the award of counsel fees should be tied to those issues on which plaintiffs prevailed. The

court indicated that separating the hours expended on the issues on which plaintiffs prevailed from the hours expended on the unsuccessful issues would be a mechanical approach and would ignore the relative importance of various issues and the interrelated nature of issues. (See Appendix B to Petition for Certiorari, A-7). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's fee award by *per curiam* opinion. The defendants then petitioned for a writ of certiorari on the attorneys' fees question, and that petition was granted on March 1, 1982.

SUMMARY OF ARGUMENT

A shifting of counsel fees from the plaintiff to the defendant is authorized by 42 U.S.C. § 1988 only where the plaintiff has been successful. Where, as in the instant case, a plaintiff has combined a variety of claims in a single action and has been successful on only some of those claims, the sole legal basis for a fee award is the plaintiff's status as prevailing party on those successful claims. It is only on successful claims that plaintiff has advanced the public interest and the policies of the civil rights laws, and thus any award of counsel fees to the plaintiff as a private attorney general must be tied to those successful claims. To the extent that a fee award compensates a plaintiff for time spent on unsuccessful claims not related to the successful claim, the fee award is unreasonable and represents the type of windfall which Congress specifically rejected in setting forth the standards for such awards. Moreover, a policy which compensates attorneys for time spent on unsuccessful claims can only encourage the litigation of such claims.

It is the position of the Amicus Curiae that the district court in this case erred by failing to analyze the legal services performed to determine which services were reasonably supportive of the plaintiffs' success. An

interpretation of Section 1988 which allows fee-shifting only where it has been demonstrated that the services were reasonably supportive of plaintiffs' success is consistent with the language of the statute, and its legislative history. Moreover, this interpretation carries forward the important public policies underlying the litigation of civil rights actions. The justification for fee-shifting extends only to those claims where the defendant has been shown to have violated the civil rights laws. A plaintiff seeking counsel fees for claims it has failed to prove does not stand before the court cloaked in a mantle of public interest, and no public policy is served by even a partial shifting of the fees for unsuccessful claims onto successful defendants.

Underlying the fee-shifting statutes is a recognition that fee awards will act as an inducement to the filing of lawsuits. In practical terms, it is inevitable that Section 1988 will serve to encourage whatever types of lawsuits it rewards. If the merit of the claim is not the key factor in a judicial determination of whether to award fees for time spent on the claim, then the merit of the claim will not be the key factor in counsel's decision on whether or not to include the claim in the case. Rather, it must be expected that counsel will recognize the possible tactical advantages of filing overly broad lawsuits carrying across-the-board allegations with the anticipation that success on a single claim will be a ticket to a fee award for the entire case. In the area of employment discrimination law, such a style of litigation would be at odds with the clearly articulated national policy favoring the negotiation and conciliation of employment discrimination claims.

The possibility that a partially successful plaintiff could receive a windfall fee award would allow the plaintiff to exert pressure on the employer either to accept an inflated settlement demand or to litigate a broad range of personnel practices at significant expense. The fee-

shifting statutes reflect a scheme which is tilted to favor plaintiffs. An unsuccessful defendant is assessed fees almost as a matter of course while an unsuccessful plaintiff can be required to pay the fees of the successful defendant only where it is shown that the plaintiff's suit was frivolous, unreasonable or without foundation. This provides a balance between the fear of frivolous litigation and the need to encourage the filing of meritorious claims. The Court should not skew this balance by interpreting Section 1988 in a fashion which permits a plaintiff to collect a fee award for time spent on unsuccessful claims.

ARGUMENT

I. THE DISTRICT COURT ERRED BY REFUSING TO TIE THE ATTORNEYS' FEES AWARD TO THE PLAINTIFFS' SUCCESSFUL CLAIMS AND BY FAILING TO LIMIT THE AWARD TO COMPENSATION FOR LEGAL SERVICES REASONABLY SUPPORTIVE OF PLAINTIFFS' SUCCESS.

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, is a fee-shifting provision which permits the court in a civil rights action to award a reasonable attorney's fee to the prevailing party as part of the costs assessed against the other party.[1] The in-

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[1] Section 1988 of Title 42, United States Code, 90 Stat. 2641, as amended, 94 Stat. 2330, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern

stant case raises the issue of how this fee-shifting provision is to be applied in a case where the plaintiffs, who aggregated a variety of claims in a single action, have been successful on some claims and unsuccessful on others. The district court rejected the argument that the fee award must be tied to the successful claims and it applied the statute in a manner which essentially allowed the fee award on the successful claims to be used as a vehicle for also collecting full counsel fees on the unsuccessful claims.

The Amicus Curiae takes no position on what the actual amount of the fee award should be in this case. The Amicus does believe, however, that the approach of the lower courts was incorrect in that the plaintiffs' petition for a fee award has no legal basis other than the plaintiffs' status as prevailing party on the successful claims. The court, in its discretion, may award a fee for time spent on unsuccessful claims *only* if it can be demonstrated that those legal services were reasonably supportive of plaintiffs' success. This standard is consistent with the language of the statute, the intent of Congress, and the policy considerations underlying litigation of civil rights actions.

A. The Statutory Scheme Offers No Basis And Reflects No Intention To Shift Attorneys' Fees On Unsuccessful Claims.

The general rule in American courts is that litigants must pay their own counsel fees and that fee-shifting can be ordered only pursuant to specific statutory au-

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the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. *In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.* (emphasis added).

thority.[2] Thus, fee-shifting in the instant case, and in similar actions, is appropriate only where a fee award is authorized specifically by the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988. The language of that statute and its legislative history indicate that Congress drafted three principal elements into the counsel fees provision.[3] These provide: (1) that awards may be made to the prevailing party; (2) that fee awards are not mandatory but are to be allowed at the discretion of the court; and (3) that awards are to be reasonable. In this statutory scheme, where Congress provided only for fee awards to successful parties and where Congress specifically declined to make those awards mandatory, there is no basis for automatic fee awards on unsuccessful claims.

Congress believed that reasonable fee awards to prevailing parties would be sufficient encouragement to private attorneys general, and the statute supports no additional inducements. The statutory scheme indicates that Congress was satisfied with the idea that the unsuccessful plaintiff would have to bear his own counsel fees. Congress evidently believed that the mere bringing of an unsuccessful action does not vindicate a public policy important enough to justify fee-shifting.

The legislative history reflects Congressional recognition of the possibility that a private attorney general could bring a suit in good faith and yet be unsuccessful. The only protection Congress believed was necessary for this unsuccessful plaintiff was the assurance that he would not have to pay his *opponents'* counsel fees, unless it could be shown that the suit was clearly frivolous, vexatious, or brought for harassment purposes. See Sen-

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[2] See *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978); and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

[3] See House Report No. 94-1558, 94th Cong., 2d Sess. 4 (1976).

ate Report No. 94-1011, 94th Cong., 2d Sess. 5 (1976).[4] Nothing in the legislative history, however, indicates a Congressional concern that the prospect of having to pay their own counsel fees if unsuccessful would deter plaintiffs from bringing meritorious civil rights actions.

The legislative history does reveal a Congressional desire that appropriate fees be awarded to plaintiffs who achieve results without having obtained a formal judgment. Thus, Congress specified that for purposes of the fee award, the term prevailing party is to be viewed broadly enough so that a party may be considered to have prevailed when he vindicates right through a negotiated settlement.[5] But never was it intended that this breadth would encompass situations where the plaintiff failed to demonstrate the alleged violation of civil rights.

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[4] In *Christiansburg Garment*, 434 U.S. at 420, this Court discussed the sparse legislative history of the similar counsel fees provisions in Title II and Title VII of the Civil Rights Act of 1964. The Court concluded that: "If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." The Court cited with approval the conclusion in *Grubbs v. Butz*, 548 F.2d 973, 975 (D.C. Cir. 1976), which found two purposes for the counsel fees provision in Title VII. "First, Congress desired to 'make it easier for a plaintiff of limited means to bring a meritorious suit'. . . . But second, and equally important, Congress intended to 'deter the bringing of lawsuits without foundation'. . . ."

[5] See Senate Report 94-1011, 94th Cong., 2d Sess. 5 (1976). See also, *Maher v. Gagne*, 448 U.S. 122, 129 (1980). This Court has not ruled on the specific question of how it is to be determined that a party has prevailed in the absence of a formal judgment. *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), requires that the lawsuit must have resulted in some legally required discernible benefit to the plaintiff. In *Nadeau*, the court indicated that achieving such a benefit entitled the plaintiffs to be considered the prevailing parties, but that the amount of the fee award they received "should be based on the work performed on the issues in which they were successful." 581 F.2d at 279.

There is no hint that Congress ever contemplated that a defendant who successfully defends a challenged practice would have to bear the burden of the counsel fees for the plaintiff who challenged that practice. As this Court recognized in construing the similar provision in the Civil Rights Act of 1964, when a district court awards counsel fees to a prevailing plaintiff, "it is awarding them against a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978).[6]

These basic considerations must not be disregarded when a civil rights action involves not simply a single claim, but rather a series of essentially distinct claims. Indeed, federal civil practice contemplates that separate claims will be included in a single complaint. See Rule 8(e), Fed. R. Civ. P.[7] When a party has filed such a

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[6] The legislative history states that it is intended that the standards for awarding fees be generally the same as under the fee provisions of the Civil Rights Act of 1964 and cites this Court's decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). In that decision, the Court ruled that the broad primary purpose of the counsel fees provision in Title II of the 1964 Act was to encourage individuals injured by discrimination to seek judicial relief. The Court acknowledged that, secondarily, the fees provision acted to penalize litigants who deliberately advance arguments they know to be untenable. On those claims where plaintiffs have failed to show a civil rights violation, neither of these purposes for an award is applicable since it must be assumed not only that there has been no injury but also that the defendant's arguments were not untenable. If the legitimacy of any arguments is to be questioned, it must be the unsuccessful assertions of the plaintiff.

Furthermore, as this Court noted in *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978), another underlying purpose of the 1976 Act was to discourage civil rights violations by increasing the potential liability of those who have ignored the law. Where the plaintiff's claim fails to demonstrate such a violation, this purpose surely requires no fee award.

[7] Rule 8(e)(2) of the Federal Rules of Civil Procedure, in pertinent part, states:

> A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.

multiple-claim suit, it is irrational at the conclusion of the suit to try to treat the action as an indivisible whole for purposes of a fee award. In such situations, it is incumbent upon the trial court to focus on the successful result achieved by the plaintiff—that is, the success that gives the plaintiff the status of a prevailing party—and to award counsel fees for the legal services which were reasonably supportive of that success. To the extent that a prevailing plaintiff collects counsel fees for time expended on unsuccessful claims unrelated to the plaintiff's success, the plaintiff's fee award is a windfall, and Congress was very specific in saying that it did not intend for this statute to produce windfalls. Reasonable fees, not windfalls, are all that is necessary to attract competent counsel to undertake civil rights actions.[8]

In the legislative history, Congress did not explicitly address the question of how fees are to be awarded in a situation where the plaintiff has filed a multiple-claim action and has been only partially successful. Congress, however, did cite several cases which it said had correctly applied the appropriate standards, and one of these cases includes an extensive discussion of the deduction of time spent on unsuccessful claims.[9] In that case,

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[8] See Senate Report No. 94-1011, 94th Cong., 2d Sess. 6 (1976). ("These [attorneys' fee] cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls for attorneys.") See also, House Report No. 94-1558, 94th Cong., 2d Sess. 8 (1976).

[9] The Senate Report referred to the fee standards set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and noted that these standards were correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). See Senate Report No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

In addition to the extensive discussion in *Stanford Daily* set forth in the text, there is a brief discussion in *Davis* in which the court

Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), the court pointed out that:

> Some federal court decisions reason that hours spent on the litigation of unsuccessful claims should be deducted from the number of hours upon which an attorneys' fee award is computed. . . . However, several recent decisions, adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients' interests. These decisions acknowledge that courts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief. (citations omitted)

The *Stanford Daily* court examined the legal services expended in connection with a motion for preliminary injunction which had been denied, but only after the plaintiffs had obtained a significant concession in which the defendants agreed to refrain from further searches of the newspaper office. It was such searches that initially gave rise to the suit. The court found that the attorneys' time spent on this matter "substantially advanced their clients' interests," and concluded that the time should be included in determining a proper award. Thus, in the primary case on this issue cited by Congress, the court

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concluded it was irrelevant that counsel had spent a limited amount of time pursuing certain issues of fact and law that did not become litigated issues or upon which plaintiffs did not prevail. It appears obvious from the court's language and from the position of this discussion in the opinion that the court in *Davis* was saying that the limited time spent on unsuccessful claims was irrelevant to the threshold question of whether the plaintiff was a prevailing party entitled to any fee award. The court did *not* appear to be concluding that time spent on unsuccessful claims is irrelevant in the determination of a reasonable fee. Indeed, the court concluded that the plaintiffs' counsel was "entitled to an award of fees for all time *reasonably expended in pursuit of the ultimate result achieved. . . .*" 8 E.P.D. at 5049 (emphasis added). Thus, the conculsion in *Davis* supports the concept that the reasonableness of a fee is tied to the results achieved by the suit.

specifically followed an approach which would deny fees for clearly meritless claims and would grant fees on other claims *only* after the court's examination revealed that the time expended was reasonably related to the plaintiffs' success.

Indeed, in the instant case, the failure of the courts below to distinguish between time spent on successful claims and time spent on unsuccessful claims is in sharp contrast to the approach followed by several other courts in interpreting Section 1988. In *Walker v. Hose Co. No. 1, Inc.*, 622 F.2d 692, 693-694 (3d Cir. 1980), the court upheld the trial court's determination that time expended on matters which did not relate to the claim of recruitment violations on which plaintiff prevailed should not be compensated in the fee award. Similarly, in *Hughes v. Repko*, 578 F.2d 483, 487 (3d Cir. 1978), the court concluded:

> It is clear to us that the fee-petitioner cannot be treated as the prevailing party to the extent he has been unsuccessful in asserting a claim. . . . Any other interpretation would run counter to the spirit of the Awards Act provision that attorney's fees should be awarded to the "prevailing" party.[10]

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[10] The court in *Hughes* suggested the following formula for calculating fees under Section 1988:

> Thus, in calculating the lodestar in connection with the successful claims, the district court should give the petitioner credit only for the hours of legal service reasonably supportive of such claims. In evaluating what hours are reasonably supportive, we believe *Lindy II* [540 F.2d 102] and *Merola II* [515 F.2d 165] require the district court to determine not only the number of hours actually devoted to the successful claims, but also whether it was reasonably necessary to spend that number of hours in order to perform the legal services for which compensation is sought. The burden of persuasion must rest on the petitioner to demonstrate to the court the number of hours attributable to the successful claim, and also to demonstrate

In *Muscare v. Quinn*, 614 F.2d 577, 580-581 (7th Cir. 1980), the court found that, where the plaintiff was the prevailing party as to his procedural due process claim but did not prevail on his substantive claim, it would be an injustice to award the plaintiff fees for time spent pursuing that unsuccessful claim. This line of decisions represents an accurate interpretation of the statute and its legislative purposes. Moreover, the approach of the Third Circuit in *Hughes* represents a standard which offers reasonable guidance to the district courts faced with deciding fee awards in cases in which the plaintiff has succeeded on some claims and failed on others.[11]

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that the number of hours so attributable was reasonably necessary to perform the work at issue.

578 F.2d at 487.

The standards for a fee award set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) include a series of factors in addition to the number of hours and the customary fee. It is apparent from the discussion in *Johnson* that the court was contemplating the application of these factors to successful claims. These factors cannot be applied to justify a fee on an unsuccessful claim. The district court in the instant case, however, appears to have thought otherwise. In ruling that the fee need not be tied to those claims on which plaintiffs prevailed, the district court noted that one of the *Johnson* factors is a consideration of the results obtained. (See Appendix B to Petition for Certiorari, A-8). The "results obtained" factor, however, was not intended as a consideration of whether or not the plaintiff was successful on its claim. Indeed, neither the *Johnson* court nor the legislative history which cites that decision intended the "results obtained" factor as a means of circumventing the "prevailing party" and the "reasonableness" requirements of the statute itself. Rather, what is intended is that a court may examine whether the successful plaintiff obtained results only for himself or whether the plaintiff vindicated rights for a much larger class by having a significant effect on the law. See *Johnson*, 488 F.2d at 718. Thus, while it is appropriate for a court to consider the significance of a plaintiff's success, the "results obtained" factor cannot be a justification for extending a fee award to include claims on which there was no success.

[11] See also, *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978). There are courts which have allowed the plaintiff to collect

B. The District Court Erred By Failing To Examine Legal Services Covered By The Fee Petition To Determine Which Services Were Reasonably Supportive Of The Plaintiffs' Success.

The district court rejected the argument that the plaintiffs' fee award should be in proportion to the plaintiffs' success in the lawsuit. The court relied on the reasoning in *Smith v. Fletcher*, 559 F.2d 1014 (5th Cir. 1977) and *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978) to conclude that dividing the hours spent on successful issues from the hours spent on unsuccessful issues would be a mechanical exercise that would ignore the interrelated nature of many prevailing and nonprevailing claims. But, by failing to examine the hours with an eye toward tying the fee to the plaintiffs' success, the court produced its own mechanical and unsatisfactory result.

Merely because a simple mechanical division is undesirable, the court is not free to make an award without examining the claimed hours to determine which were reasonably supportive of plaintiffs' success. Although there are cases where the successful and unsuccessful claims may be inextricably intertwined, there also are many cases where the unsuccessful claims are quite independent of the successful claims. The cases relied on

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counsel fees for work on unsuccessful claims. Generally, these decisions follow the opinion in *Northcross v. Board of Education*, 611 F.2d 624, 635-636 (6th Cir. 1980), which provided that so long as a party "has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation." This standard permits an unexamined award of hours which is entirely contrary to the examination of hours spent on unsuccessful claims in the *Stanford Daily* decision cited in the legislative history. Moreover, this places the court in the difficult position of deciding whether a plaintiff who has succeeded on two or three of six claims, for example, has "prevailed on the case as a whole."

by the district court involved situations very different from the situation in the instant case. In *Smith v. Fletcher*, there was *no* unsuccessful claim. The plaintiff had alleged both sex and handicap discrimination and had prevailed on both allegations. The finding of handicap discrimination was not in issue on appeal, 559 F.2d at 1016 n.5, and the finding of sex discrimination was affirmed on appeal, 559 F.2d at 1018. The court noted that the case did not involve a situation where sex discrimination and handicap discrimination had occurred separately, but that the two types of discrimination had been inextricably intertwined, and the court thus declined to separate the time spent on the one *successful* claim from time spent on the other *successful* claim. In *Brown v. Bathke*, 588 F.2d at 637 n.5, the court noted that there are cases in which a party combines constitutional claims with nonconstitutional claims, and that where the party prevails on the nonconstitutional claim, the court can deliberately choose not to reach the constitutional claim.[12]

The situations discussed in *Brown* and *Smith* are significantly different from a situation where the plaintiff has included in the action a separate claim upon which

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[12] Other courts have recognized the difference between situations where plaintiff is seeking recovery on several theories which all are part of one matter and situations where plaintiff has presented several claims which are clearly distinct. See *Miller v. Carson*, 628 F.2d 346, 349 n.3 (5th Cir. 1980), which notes that apportioning a fee award on the basis of work done on successful and unsuccessful issues would be appropriate where the action involves distinct claims, and *Lamphere v. Brown University*, 610 F.2d 46, 47 (1st Cir. 1979), where the court indicated it would not penalize counsel for every lost motion but noted that the situation was different from a case where claims are "truly fractionable." Similarly, in *Manhart v. City of Los Angeles, Department of Water and Power*, 652 F.2d 904, 909 (9th Cir. 1981), the court held that plaintiffs were entitled to an award for time spent pursuing several claims to remedy the same injury (gender discrimination), but noted that "no compensation may be paid for the time spent to prepare unrelated claims on which plaintiffs did not prevail."

the plaintiff presented little or no evidence and on which the court has ruled against the plaintiff. In the instant case, for example, the plaintiffs alleged, *inter alia*, that the defendants were violating the constitutional rights of the patients by excessive use of medication. On this claim, the district court made the following finding:

> Plaintiffs' contention that there is excessive use of medication to control patient behavior, a form of "chemical restraint," is not supported by the record. Expert witnesses from both sides testified that observation of patients and examination of records indicated that Forensic Unit patients are not overmedicated.

Eckerhart v. Hensley, 475 F. Supp. 908, 925-926 (W.D. Mo. 1979) (Joint Appendix, 201-202). Obviously the district court found this claim to be without merit, and yet the plaintiffs' fee award appears to include compensation for the time spent on this claim. In light of the court's conclusion that the claim was without merit, the court acted improperly by including in the fee award the time spent on this unsuccessful claim without first having made a determination that the work performed on this claim was reasonably supportive of the plaintiffs' success. It is not sufficient to assume, merely because the unsuccessful claim was included in the same complaint, that it was intertwined with the successful claims.

As a general rule, an award of counsel fees should not include any allocation of hours which has not been analyzed by the court. See *Hughes v. Repko*, 578 F.2d 483, 487 (3d Cir. 1978). The burden of presenting the court with sufficient information to permit such an analysis falls on the party seeking the fee award. In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the opinion cited in the legislative history as setting forth the appropriate standards for a fee award, the court made it clear that the trial court's task is not an easy one, and the plaintiff's burden is not a light one:

> We are mindful of the difficult job of the trial judge in cases of this kind. . . . The trial judge is necessarily called upon to question the time, expertise, and professional work of a lawyer which is always difficult and sometimes distasteful. But that is the task, and *it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorney's fees just as he would bear the burden of proving a claim for any other money judgment.*

488 F.2d at 720 (emphasis added). The plaintiff who has been only partially successful carries the burden of producing counsel records which provide the court with a proper basis for determining how much time was spent on particular claims. See *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978). In *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980), the court similarly indicated that a simple compilation of counsel's total hours was not a satisfactory basis for a fee award. Interpreting the counsel fees provision in Title VII of the Civil Rights Act of 1964, the court described the process for calculating the "lodestar," which is the number of hours reasonably expended multiplied by a reasonable hourly rate:

> Compiling raw totals of hours spent, however, does not complete the inquiry. It does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended. In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority. Thus, no compensation is due for nonproductive time. . . . no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail.

641 F.2d at 891-892 (footnote omitted). Recently, in further defining the "lodestar" approach, the District of Columbia Circuit reiterated that the *Copeland* framework places a difficult burden on the trial court which can be

met only if the fee applicant meets his correspondingly heavy obligation to present a well-documented fee application which is sufficiently detailed to permit the court to make an independent determination whether or not the hours claimed are justified. See *National Association of Concerned Veterans v. Secretary of Defense*, —— F.2d ——, D.C. Cir. (Nos. 81-1364 and 81-1424, decided April 23, 1982).[13] The Amicus submits that the instant case should be remanded to the district court for a determination as to the amount of time reasonably expended on the successful claims of the plaintiff.

II. PUBLIC POLICY CONSIDERATIONS FAVOR AN INTERPRETATION OF SECTION 1988 WHICH DOES NOT AWARD COUNSEL FEES EXCEPT FOR LEGAL SERVICES REASONABLY SUPPORTIVE OF PLAINTIFFS' SUCCESS.

The public policy underlying the fee-shifting provision of Section 1988 is a desire to promote the vindication of civil rights by facilitating the litigation of meritorious claims. This must not be misinterpreted as simply a general desire to encourage more litigation.[14] The intent

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[13] The "lodestar" concept originated in the calculation of the fee award in an antitrust case. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*), and, *after remand*, 540 F.2d 102 (3d Cir. 1976) (*en banc*) (*Lindy II*). The approach has been applied frequently in calculating fee awards in other types of cases, including civil rights actions. *National Association of Concerned Veterans* is a consolidated appeal involving the fee provision of Title VII of the Civil Rights Act of 1964 and the fee provision of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E). The court in *National Association* reasserted the standard stated in *Copeland* that under Title VII fees are not recoverable for time expended on issues on which the plaintiff did not ultimately prevail and that time should be excluded where the unsuccessful claims are fractionable. (Slip opinion at 12).

[14] The fee-shifting mechanism must not be confused with the criminal justice programs by which society assures that every accused will have legal representation. In the criminal justice

was to encourage suits that would vindicate our civil rights policies. As this Court observed in *Christiansburg*, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." 434 U.S. at 418. Where no violation is demonstrated, there is no justification for fee-shifting. And, where several violations are alleged, but only one is proved, there is no justification for shifting more than the fees related to the proved violation. No public policy is served by even a partial shifting of the fees of unsuccessful plaintiffs onto successful defendants. A partially successful plaintiff who comes before the court seeking an award for time spent on an unsuccessful challenge to a lawful practice does not appear cloaked in the mantle of public interest on that claim, and thus the policy reasons which generally support an award of fees to the plaintiff simply are not present.[15]

In *Christiansburg*, this Court suggested that allowing

> fee awards only to *prevailing* private plaintiffs should assure that [Section 706(k) of Title VII] will not in itself operate as an incentive to the bringing of claims that have little chance of success.

434 U.S. at 422 (footnote omitted). This can be true, however, only if the fee-shifting provision is interpreted as allowing awards only for time spent to achieve plaintiff's success. Indeed, the fee-shifting provisions in Section 1988 and in Title VII embody a recognition that fee awards will act as an inducement to the filing of lawsuits. In practical terms, it is inevitable that such

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programs, society as a whole is bearing the expense to assure that every defendant has the opportunity to fully litigate his defense, regardless of its merits. To the contrary, the fee-shifting mechanism imposes the burden of counsel fees on the defendant who has been shown to have been responsible for the violation.

[15] See discussion of policy considerations in *Christiansburg*, 434 at 418-422, and in *United States Steel Corporation v. United States*, 519 F.2d 359, 363-364 (3d Cir. 1975).

a fee-shifting statute will serve to encourage whatever types of lawsuits it rewards. Where no violation is demonstrated, there is no justification for fee shifting. And, where several violations are alleged, but only one is proved, there is no justification for shifting more than the fees related to the proved violation. No public policy is served by even a partial shifting of the fees of unsuccessful plaintiffs onto successful defendants.

In the area of employment discrimination litigation, the area with which the Amicus is most directly familiar, it has not been uncommon for plaintiffs to file actions alleging a variety of claims. Plaintiffs, who believe themselves to have been discriminated against in one particular employment transaction, often attempt to prove their claim through statistical evidence by challenging the employers' practices as a whole. It is a routine practice for plaintiffs to seek to challenge a variety of employment practices in a single cause of action.[10] If, in such cases, the plaintiff's attorney knows that by prevailing on any one of these allegations he can force the employer to bear the full load of the counsel fees for the suit, it may be expected that the plaintiff would pursue all these claims regardless of the prospect for success. And, by the threat to litigate such a variety of claims, the plaintiff can exert pressure on the employer to either accept an inflated settlement demand or litigate

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[10] In *Equal Employment Opportunity Commission v. Safeway Stores*, 597 F.2d 251 (10th Cir. 1979), for example, the individual employee complained of alleged discriminatory work assignment and resulting injury and constructive discharge. The employer prevailed on each of these claims and the employee prevailed *only* on his allegation of a discriminatory suspension. The Court of Appeals, in affirming the district court's fee award, stated that the "dollar amount of an attorney's fee to be awarded in a case of this type depends upon the extent to which the plaintiff himself prevailed in his civil right's action." 597 F.2d at 253.

all of its personnel practices at significant expense.[17] Employers who are within the law should be insulated to the greatest extent possible from litigation.[18]

Generally, public policy does not favor coerced settlements or litigation of needlessly overbroad claims. The area of civil rights is no exception. Indeed, under Title VII of the Civil Rights Act of 1964, the public policy favoring settlement of civil rights matters through comprehensive negotiation and conciliation is reflected in the statutory scheme.[19] An interpretation of the counsel fees

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[17] In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court noted that actions have been and can be needlessly extended by attorneys for reasons which are contrary to public policy, 447 U.S. at 757 n. 4. As one observer has noted:

> By allowing a prevailing plaintiff reimbursement even when he loses part of the case, the system provides no real incentive for plaintiffs to narrow the scope of the issues in the litigation. On the contrary, plaintiffs are free to add claims for tactical or other purposes with the knowledge that for each claim won, they will obtain both damages and costs; yet for those lost, they will incur no liability so long as the claim was not violative of the relatively strict *Christiansburg* standard. By contrast, under the European systems in which fee claims by plaintiffs and defendants are judged by the same standard, a litigant who goes to court with two claims and wins only one forgoes counsel fees: thus defendant's victory on one issue exactly balances the plaintiff's victory on the other. This encourages plaintiffs to plead no more than they can reasonably expect to win, a process that serves to reduce court congestion.

Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 355 (1980).

[18] See *N. Cruz, Abuse of Rights in Title VII Cases: The Emerging Doctrine*, 67 A.B.A.J. 1472 (Nov. 1981).

[19] See *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for voluntary settlement of employment discrimination claims."), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The counsel fees provision in Title VII is virtually identical to the provision in Section 1988 at issue in this case. The legislative history of the Title VII fees provision is quite brief, but it does include an explanation by Senator Humphrey that the purpose

provision which awards fees only for services reasonably supportive of plaintiffs' success fully satisfies the public policy of encouraging meritorious claims by victims of discrimination. And it does so without offering an inducement for expanded litigation that would interfere with the desirable process of settlement negotiations.

As an indication of the reasonableness of the standard supported by the Amicus in this case, it may be noted that a variety of courts have indicated that plaintiff's fee awards under Section 1988 and under Title VII should include compensation only for services reasonably supportive of plaintiffs' success.[20] Such awards properly recognize that the statutory schemes for the award of attorney's fees in civil rights actions have already been tilted toward the plaintiff to assure that no plaintiff will be deterred from bringing an action. A plaintiff who brings an unsuccessful claim will not be ordered to pay the counsel fees of the defendant unless it is shown that the plaintiff's suit was frivolous, vexatious, or without foundation. Unsuccessful defendants, by contrast, are

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of the provision was to "make it easier for a plaintiff of limited means to bring a meritorious suit." See floor statement, June 4, 1964, 110 Cong. Rec. 12724. See also *Christiansburg*, 434 U.S. at 420. The legislative history offers no indication that Congress was uncomfortable with the idea that a plaintiff would have to bear his own fees for an unsuccessful or nonmeritorious claim.

[20] In addition to the Section 1988 and Title VII cases discussed above, it may be noted that the courts in *Batiste v. Furnco Construction Corp.*, 503 F.2d 447, 451 (7th Cir. 1973), and in *Williams v. General Foods Corp.*, 492 F.2d 399, 409 (7th Cir. 1974), stated that as a general guideline the amount of the counsel fees award should be proportionate to the extent that the party prevailed in the suit. In *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979), the court in applying the counsel fees provision of Title VII, concluded that with each party prevailing in some part, it was appropriate to award counsel fees to neither the plaintiff nor the defendant. See also *Adams v. Reed*, 567 F.2d 1283, 1288 (5th Cir. 1978) ("Both the propriety of a fee award and the amount of the fees properly awarded are strongly influenced by the extent to which plaintiff prevails in his suit").

required to pay plaintiffs' counsel fees in all but special circumstances. *Christiansburg*, 434 U.S. at 417. This has achieved a delicate balance between deterrence of meritorious suits and encouragement of meritless actions. The interpretation of Section 1988 by this Court must mirror that balance by providing that a plaintiff can be compensated only for those legal services which reasonably advanced the successful claim which entitled the plaintiff to seek the fee award.

CONCLUSION

For the reasons set forth, the Amicus Curiae respectfully suggests that the Eighth Circuit decision should be reversed and the case remanded to the district court for the calculation of a fee award that compensates only those legal services which reasonably supported the plaintiffs' success in this action.

Respectfully submitted,

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No. 81-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

C. DUANE HENSLEY, *et al.*,

Petitioners,

v.

THOMAS ECKERHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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No. 81-1244

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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C. DUANE HENSLEY, et al.,

Petitioners,

v.

THOMAS ECKERHART, et al.,

Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the the Eighth Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE

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Interest of Amici*

The NAACP Legal Defense and Educational Fund, Inc., ("LDF") is a non-profit

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* Letters of consent to the filing of this brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

corporation formed in 1939 to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. LDF attorneys have represented parties and participated as amicus curiae in this Court and other courts in cases involving the broad range of civil rights litigation.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee has, over the past nineteen years, enlisted the services of well over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The American Civil Liberties Union is a nationwide organization of 250,000 members dedicated to the protection of constitutional rights. Meaningful access to the courts is essential to the vindica-

tion of such rights. See In re Primus, 436 U.S. 412 (1978).

All three amici operate through the services of volunteer private counsel in addition to the limited litigation they handle directly. The services of such counsel are dependent upon the availability of adequate court awarded attorneys' fees pursuant to statutes such as 42 U.S.C. § 1988. The correct interpretation and implementation of such legislation is critical to the work of amici and to the effectuation of the congressional policies embodied in the civil rights laws. For this reason, at least one of amici have participated as counsel or as amicus curiae in most of the major attorneys' fee cases before this Court and the courts of ap-

peals.*/

SUMMARY OF ARGUMENT

This case presents an important question regarding the application of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 ("the Act"): Whether prevailing plaintiffs' fees should be fractionalized according to issues won or lost. It will materially affect the ability of private litigants to obtain counsel who will vigorously and effectively work to vindicate the rights secured by the broad range of civil rights legislation.

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*/ See, e.g., White v. New Hampshire Dept. of Empl. Sec., ___ U.S. ___, 71 L.Ed. 2d 325 (1982); Hutto v. Finney, 437 U.S. 678 (1978); Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc).

In §1988, Congress carefully crafted a statute that incorporated and endorsed the prior case law which had rejected the proportionality approach and awarded full fees for all issues litigated in good faith by prevailing plaintiffs. This is made clear by the fact that §1988 tracks the language of prior attorneys' fees statutes and by the fact that the legislative history explicitly incorporates the case law under those statutes and the "private attorney general" line of cases, citing to specific cases which awarded fees for all time reasonably expended.

Moreover, both the testimony adduced at the hearings and the reports and legislative debates make clear that Congress was acting to equalize the legal resources available to the parties in civil rights cases. It sought to provide civil rights plaintiff's counsel with the same economic

incentives to vigorously present his client's case as were already available to defendant's counsel.

Not only is the proportionality approach urged by petitioners a misreading of the Act, it is unworkable. It would greatly increase the burden on judicial resources, as well as the final attorneys' fee bill borne by defendants. It ignores the complex and interrelated nature of most civil rights litigation. Moreover, it would place civil rights counsel in an intractable ethical dilemma, pitting his economic self-interest against the interests of the client.

The case law adopted by Congress in passing the Act adequately balances the need to provide equal legal resources and the need to prevent abuse or windfalls to attorneys. Under that case law, courts are to look to the realities of litigation, compensating all time reasonably spent to

further the client's interest but not compensating for work spent on frivolous or clearly meritless issues. The standards endorsed by Congress also allow a reduction in the total fee when counsel's efforts only bring success on a minor or peripheral point. This is the very standard applied by the court below. The judgment should therefore be affirmed.

ARGUMENT

I.

IN ENACTING SECTION 1988, CONGRESS SPECIFICALLY INCORPORATED THE PRE-EXISTING CASE LAW WHICH PROVIDED THAT A PREVAILING PLAINTIFF SHOULD RECEIVE A FEE FOR TIME SPENT ON ALL NON-FRIVOLOUS ISSUES

Section 1988 does not on its face speak to the question of whether fees should be proportioned to the issues won or lost.[1/] It is therefore necessary to

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1/ Thus, the petitioner's reliance on the "plain meaning" of the Act is misplaced. This is made clear by the amici States' argument for a "prevailing claim"

review the legislative history. The committee reports and the legislative debates make clear that Congress used the precise language of Titles II and VII in order to

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1/ continued

rule. Brief at 10. The statute speaks of fees for a "prevailing party," not for a "prevailing claim" or on "prevailing issues" or only "to the extent that a party prevails." Had Congress intended to make recovery of fees proportional to a party's success, there was surely a simpler and more explicit way to express that idea.

Application of the "plain meaning" doctrine is inappropriate for another reason. This Court has recognized that "§1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964...." Hanrahan v. Hampton, 446 U.S. 754, 758 n.4 (1980). It has looked at the fee shifting provisions of these statutes as an interlocking scheme, construing them in a parallel and consistent fashion. See, e.g., New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70-71 n. 9 (1980). This Court has gone beyond the "plain meaning" of the statute in construing the fee shifting provision of Title VII, looking instead to the equitable considerations that underlie that Act. Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 418 (1978) (requiring higher standard for award of fees to prevailing defendants under Title VII).

adopt the prior case law under those statutes, as well as that under the "private attorney general" theory. In doing so, it was aware that this case law held that a fee to a prevailing party should not be fractionalized issue by issue; indeed, it cited specific examples.

A. Section 1988 Incorporates the Prior Case Law:

As explicated in the Senate Report:

> S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3 (b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. §1973l(e). . . . It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 2,4 (1976).[2/] Senator Kennedy, one of

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2/ The report also indicated that the standards that apply in equally complex federal litigation such as antitrust should also be applied. Id. at 6.

The importance of the committee report in establishing congressional intent is

the sponsors of the bill,[3] further indicated that the bill "is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees allowed prior to the Alyeska decision." 122 Cong. Rec. S 16252 (daily ed., Sept. 21,

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2/ continued

well established: "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969).

3/ In Schwegman Bros. v. Calvert Distillers Corp, 341 U.S. 384 (1951), this Court noted that: "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Id. at 394-95. Recently, in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), this Court explained that: "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history . . ., [but] must be considered with the Reports of both Houses and the statements of other Congressmen...." Id. at 311. Since Senator Kennedy's remarks as sponsor are wholly consistent with and complementary to the bulk of the legislative history, they possess added weight.

1976).[4/]

During the floor debate in the House, Congressman Drinan, the bill's sponsor and the author of the committee report,[5/] amplified on the comments in that report. See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. at 5-6 (1976). He noted that the Act "is intended to restore" the pre-Alyeska practice in the lower courts. 122 Cong. Rec. H 12159 (daily ed. Oct. 1, 1976).

The language of S. 2278 tracks the wording of attorney fee provi-

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4/ In the House, both Representatives Railsback and Bolling noted that the bill merely codified and restored the pre-Alyeska law. 122 Cong. Rec. H 12154-12155 (daily ed., Oct. 1, 1976).

5/ Mr. Drinan's exposition is especially authoritative since he was a member "of the House Judiciary Committee responsible for . . . [these] matters, author and chief sponsor of the measure under consideration, and a respected congressional leader in the whole area. . . ." Foti v. Immigration and Naturalization Service, 375 U.S. 217, 223 n.8 (1963).

> sions in other civil rights statutes such as section 706 (k) of Title VII -- employment -- of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application.... These evolving standards should provide sufficient guidance to the courts in construing this bill which uses the same term.

122 Cong. Rec. H 12159-12160 (daily ed., Oct. 1, 1976) (emphasis added).[6/]

B. The Prior Case Law Did Not Apportion Fees to Issues Won:

In 1976 when Congress debated and passed the Act, courts were not apportioning fees to plaintiffs based on the extent to which they prevailed under either the "private attorney general" cases or the attorneys' fee provision of Title VII on which the Act was modeled. For example, in Fairly v. Patterson, 493 F.2d 598 (5th Cir. 1974), a voting rights case where fees

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6/ Representative Anderson, one of the floor managers of the bill, also made this point at the opening of the floor debates. 122 Cong. Rec. H 12150 (daily ed., Oct. 1, 1976).

were awarded under the "private attorney general" theory, the court affirmed a fee award to the original plaintiffs even though they had spent time opposing a redistricting plan which was accepted by both the plaintiff-intervenor and the district court and even though the court ultimately found that plaintiffs did not have standing to challenge on appeal the plan adopted.[7/] Similarly, the lower court in Bradley v. School Bd. of the City of Richmond, 416 U.S. 696 (1974), awarded substantial fees to plaintiffs without any reductions for the time spent advocating plans for greater and speedier desegregation than that approved by the court. 53

7/ The only reduction to the fee discussed by the court was the district court's reduction because plaintiffs' counsel worked for a public interest organization. The Fifth Circuit specifically disapproved this reduction. 493 F.2d at 606-07. Fairly is cited with approval on this latter issue by the House Report at 8 n.16.

F.R.D. 28 (E.D. Va. 1971).[8/] And in yet another "private attorney general" case, Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), the court refused to reduce the award for time spent attempting to obtain an injunction against future searches which the court declined to grant. See also Wade v. Mississippi Cooperative Extension Service, 378 F. Supp. 1251, 1254 (N.D. Miss. 1974) (fees awarded under "private attorney general" theory in employment case under § 1981 although "plaintiffs did not obtain all relief sought").

The pre-Act Title VII cases also routinely awarded fees without apportionment for issues lost. In Palmer v. Rogers, 10 E.P.D. ¶ 10,499 (D.D.C. 1975), the court held that plaintiff was the prevailing

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8/ In Bradley, this Court indicated only that the district court's award for this time was premature, as it was made before the plaintiffs actually prevailed. 416 U.S. at 724. Nowhere did this Court indicate that it was not compensable.

party even though the court granted relief on less than all counts. Id. at 6130. It went on to reject the federal government's argument that the plaintiff should only be compensated for the time spent on the successful count.

> The court is aware of no law firm which records hours on the basis suggested by the defendants nor does it believe that such a system is feasible.

Id. at 6130-31. It noted that

> the policy underlying the fee provisions of Title VII is best served by encouraging plaintiffs to seek the broadest relief they feel, in good faith, that they are entitled to.

Id. at 6130. See also United States v. Operating Engineers, Local Union 3, 6 E.P.D. ¶ 8946 at 6034 (N.D. Cal. 1973) (court refuses to apply proportionality approach; although plaintiffs did not obtain all relief sought, court considers them as completely prevailing party because achieved significant result); Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444

at 5049 (C.D. Cal. 1974) ("not legally relevant" that plaintiffs spent time on "issues of fact and law that ultimately did not become litigated ... or upon which plaintiffs ultimately did not prevail"); Watkins v. Scott Paper Co., 530 F.2d 1159, 1198 & n.53 (5th Cir. 1976) (fees awarded to individual plaintiff denied relief because plaintiffs "proved most of the ... violations they alleged" on class claims). Cf. Parker v. Mathews, 411 F. Supp. 1059, 1063-64 (D.D.C. 1976), aff'd, 561 F.2d 320 (D.C. Cir. 1977) (settling plaintiff considered prevailing party because "successful ... with respect to the central issue -- discrimination").[9/]

9/ Parker is cited with approval in the House Report on just this point. Id. at 7.

Amici have found only three pre-Act cases which indicate that fees should be apportioned. Batiste v. Furnco Constr. Corp., 503 F.2d 447, 451 (7th Cir. 1974) Williams v. General Foods Corp., 492 F.2d 399, 409 (7th Cir. 1974); Schaeffer v. San Diego Yellow Taxi Cabs, Inc., 462 F.2d

The pre-Act practice was the same under the fee shifting provisions of the

9/ continued

1002, 1008 (9th Cir. 1972). However, as as we show below, the existence of conflicting case law under Title VII is inconsequential where Congress indicated which line of cases it approved by citing Davis, supra, on this exact point. See S. Rep., supra, at 6.

It should also be noted that both Williams and Schaeffer are examples of the application of other standards in awarding fees which were specifically repudiated by Congress in § 1988. Schaeffer held that the award of fees to a prevailing party is permissive, 462 F.2d at 1008 n.5, while § 1988 requires that fees be awarded unless "special circumstances" exist. S. Rep., supra, at 4. Williams, which relied on Schaeffer on the proportionality issue, limited fee awards "to those parties who are successful in court." 492 F.2d at 408. Congress rejected that approach, authorizing awards to plaintiffs who settle or are the catalyst for voluntary change. S. Rep., supra, at 5; H. R. Rep., supra, at 7 and cases cited therein.

Finally, Bastiste, relied on by amicus Equal Employment Advisory Council merely cites the district court's statement on the matter; in fact, it reversed and remanded on the merits of the Title VII claim and never reached the fees issue. Id. The other cases cited by amicus were decided post-Act and obviously could not have been the source of case law Congress thought it was adopting.

antitrust laws which Congress also cited as models. See n. 2, supra. See Locklin v. Day-Glo Color Corp., 429 F.2d 873, 879 (7th Cir. 1970) (Clayton Act: court rejects challenge to "effort spent on unnecessary issues;" although they appeared unnecessary in "hindsight," they were not "manufactured"); Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 91-92 (1st Cir. 1970) (same: court rejects rule "which would require a fragmentation of every appeal into the parts won and lost by plaintiffs"); Lewis v. Pennington, 400 F.2d 806, 820 (6th Cir. 1968) (same: although parties "prevailed on only one of two grounds advanced, they are to be deemed 'prevailing parties.'"). See also Swann v. Charlotte-Mecklenburg Bd. of Ed., 66 F.R.D. 483, 484 (W.D.N.C. 1975).

C. Congress Cited Specific Cases Rejecting the Proportionality Approach as Correct Applications of the Standards It Was Adopting:

To the extent there was conflict in the case law, the Senate left little doubt about which line of cases it intended to incorporate.

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D.Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep., supra, at 6.

As indicated above, both Stanford Daily and Davis are examples of pre-Act cases which rejected the proportionality of prevailing claim approach to fee awards. The report addressed this issue directly.

> In computing the fee, counsel for prevailing parties should be paid,

> as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." Davis, supra; Stanford Daily, supra, at 684.

S. Rep., supra, at 6. Beyond its "plain meaning," this passage is significant for two reasons. First, as courts both before and after the passage of the Act have recognized, Congress knew, see Point II., infra, that there is "no 'traditional' method of billing whereby an attorney offers a discount based upon his or her failure to prevail on 'issues or parts of issues.'" Northcross v. Board of Ed., 611 F.2d 624, 636 (6th Cir. 1979). Accord, Palmer, supra, 10 E.P.D. at 6130-31; Allen v. Terminal Transport Co., Inc., 486 F. Supp. 1195, 1201 (N.D. Ga. 1980), aff'd sub nom. United States v. Terminal Transport Co., Inc., 653 F.2d 1016 (5th Cir. 1981).[10/] Second, Congress spe-

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10/ Two other portions of the legislative history confirm Congress's inten-

cifically approved the cited portions of Stanford Daily and Davis.

Petitioner and amicus Equal Employment Advisory Counsel argue that Stanford Daily and Davis speak to the determination of prevailing party status and not the proportionality issue. The amici States make the incredible argument that these cases were cited on the issue of availability of fees in cases that provide

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10/ continued

tion that fees not be proportioned to the issues won. An earlier portion of the Senate report notes that "citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep., supra, at 2. Similarly, Congressman Drinan's exposition of the meaning of the bill, cited, supra, at 11-12, makes clear "that the phrase 'attorney's fee' would include the values of the legal services provided by counsel...." 122 Cong. Rec. H 12160 (daily ed. Oct. 1, 1976). Civil rights plaintiffs could not, in fact, go into the legal marketplace and hire attorneys to handle their cases for a fee proportioned to the issues won. Since the Act intended that plaintiffs be reimbursed for the real cost or value of the services obtained, their fee awards cannot be so apportioned.

no damage awards and that the legislative history is silent on the proportionality issue. But even a cursory reading of these cases indicates that the specific pages and language cited by the Senate report deal with the precise issue before this Court. At the exact page cited by the Senate report,[11/] the Stanford Daily court said:

> Some federal court decisions reason that hours spent on the litigation of unsuccessful claims should be deducted from the number of hours upon which an attorneys' fee award is computed. See Bowl America Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080, 1100 (D. Md. 1969); Osborn v. Sinclair Refining Co., 207 F. Supp. 856, 864 (D. Md. 1962), rev'd and remanded on other grounds, 324 F.2d 566 (4th Cir. 1963). However, several recent decisions, adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients' interests.

11/ Stanford Daily, it should be noted, was reprinted in full in the Senate hearings. The Effects of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93rd Cong., 1st Sess. at 1334 (1973).

> These decisions acknowledge that courts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief. See, e.g., Trans World Airlines v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), aff'd with respect to fee award, 449 F.2d 51 (2nd Cir. 1971), rev'd on other grounds, 409 U.S. 363, 93 S. Ct. 647, 34 L.Ed.2d 577 (1973). One Seventh Circuit panel, for example, allowed attorneys' fees for legal services which appeared unnecessary in hindsight but clearly were not "manufactured." Locklin v. Day-Glo Color Corporation, 429 F.2d 873, 879 (7th Cir. 1970) (concerning fees for antitrust counterclaims).
>
> Plaintiffs' attorneys obviously were not manufacturing legal services in constructing their preliminary injunction motion. They did not secure the full, injunctive relief which they originally requested, but they did obtain a significant concession from defendants as a result of their motion. In the process, they substantially advanced their clients' interests. The court finds that the attorney time spent on this motion (approximately 50 hours) should be counted in determining a proper award.

64 F.R.D. at 684.

Similarly, the language quoted from Davis was precisely in the context of the

question of whether the plaintiffs, whom the court had already determined were the prevailing parties, 8 E.P.D. at 5047-48, should be compensated for time spent on certain issues on which they did not prevail.

> It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.

Id. at 5049.

In summary, there can be no doubt that Congress acted to see that prevailing plaintiffs would be compensated for all time reasonably expended, without fractionalizing. It incorporated the

case law under the prior fee statutes and the "private attorney general" theory which had explicitly and overwhelmingly taken this position. To the extent that case law may have been conflicting, it cited specific cases which rejected fractionalizing an award as correct applications of the appropriate standards. "The drafters... were aware of the prior interpretation ... and ... that interpretation reflects their intent." Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) (finding private cause of action under Title IX based on incorporation of prior interpretation of same language in Title VI).

As we show below, Congress acted deliberately to further a "sound public policy" very different than that pressed by petitioners and its supporting amici; one based on the problems that were established during the hearings before it.

II.

IN PROVIDING FOR FEE SHIFTING, CONGRESS INTENDED THAT COUNSEL IN CIVIL RIGHTS CASES BE COMPENSATED IN THE SAME MANNER THE MARKET TRADITIONALLY COMPENSATES COUNSEL IN ORDER TO EQUALIZE THE RESOURCES OF THE PARTIES

Congress's adoption of the pre-existing case law repudiating the apportionment theory was in response to the evidence put before it at the hearings. See Holy Trinity Church v. United States, 143 U.S. 457, 463 (1892). The testimony before the subcommittees in both houses was that one of the chief economic barriers to the private enforcement of civil rights was the significant disparity between the resources of the parties. The greater resources that were available to civil rights defendants, moreover, were (and are) being provided by tax and other public dollars. In enacting fee shifting, Congress acted to equalize these resources and provide

counsel engaged by civil rights plaintiffs with the same economic incentives to present their cases in a thorough and effective fashion as were available to defendants' counsel.

A. The Problem Presented at the Hearings:

The testimony and evidence before the subcommittees in both houses established an imbalance in the American system of justice. The Senate subcommittee heard the testimony of Dennis M. Flannery, one of the lawyers who litigated Alyeska, supra.

> The most important goal that the Subcommittee should keep in mind is the thought that if we are going to operate in an adversary system, that system should be able to function as an adversary system, and if a case is being litigated supposedly between two adversaries presenting the best picture they can for their side before a neutral judge who is then supposed to choose between the sides from the clash of opposing views, I think the Subcommittee should be very concerned that that

> is not simply a mock ritual but that there is a real clash of views roughly equal in preparation, roughly equal in skill.....
>
> In many cases we hear rhetoric about how important our citizen groups are and how our judicial system is the system within which disputes are finally settled. But the rhetoric is really empty when you get up against the cold fact that the resources available to opposing sides in many cases are so disparate.

The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93rd Cong., 1st Sess. at 834-35 (1973). He characterized public interest litigation as a battle

> between David and Goliath. In this battle, however, Goliath holds the slingshot as well as the weight advantage....
>
> It is important, I believe, to emphasize here, that neither corporations nor the law firms that represent their interests need be the least bit defensive about leaving no stone unturned in putting forward their best possible case. Indeed, the adversary system, not to mention the canons of

> legal ethics, demands no less. The problem is that under present circumstances the corporation's citizen interest adversaries cannot devote anything approaching a comparable expenditure of resources to the development of their side of the case. 12/

Senate Hearings, supra, at 841.

When the ABA sponsored Council on Public Interest Law testified before the House subcommittee in favor of fee shifting in civil rights cases,[13/] it noted that: "It is this need for high quality representation that brings us here today."

12/ As pointed out by an earlier witness, the existence of public interest groups like undersigned amici does not redress this imbalance. At the time of the House hearings, the three undersigned amici and other similar groups constituted only about 200 of the 300,000 to 400,000 lawyers in the country. House Hearings, supra, at 98-99 (Testimony of Armand Derfner). All three organizations rely heavily on the help of private counsel. See discussion, supra, at 3.

13/ While this testimony supported fee shifting in a variety of public interest areas, it concurred with the approach taken in H.R. 9552, which became §1988, that civil rights was a priority area. Id. at 125.

Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 94th Cong., 1st Sess. at 123 (1975)(Testimony of Charles R. Halpern, Executive Director, Council for Public Interest Law).

> The issue is not one of preferred standing or preferred access for unrepresented groups and those who are too poor to hire their own lawyers, but only a sufficient subsidy to bring them up to the level of wealthier persons who can hire a lawyer and go into Federal court to vindicate their rights.

Id. at 128.

The testimony before both houses illustrated the significant imbalance that exists in civil rights litigation. The ABA testified before the House subcommittee about

> the need of the public to have both points of view properly represented. When the Government is involved, it is

> going to give a good run to its point of view. But too many cases have been decided by default, the failure to have a good presentation on the part of the other side.

House Hearings, supra, at 79 (Statement of Charles A. Hobbs, Member, Special Committee on Public Interest Practice of the American Bar Association). Relative to the civil rights plaintiff, the

> opposition frequently has virtually unlimited resources, often including expert outside counsel. A federal, state, or even local agency defendant can draw upon the public treasury, and call upon full-time research assistants, the Federal Bureau of Investigation or state or local law enforcement investigators, and the myriad of support services which exist for the use of those agencies. Corporate litigants likewise often have vast resources, subsidized by tax deductions, with which to resist public interest claims. The result is that, especially in the larger public interest case, the sides become extremely unequal. This fact subverts the American system of justice, where two equal sides are expected to face one another in a vigorous adversary procedure, and the side asserting the correct position -- not necessarily the side with the most money -- wins.
>
> * * *

> When Congress calls upon citizens (either explicitly or by construction of its statutes) to go to court to vindicate its policies and benefit the entire nation Congress must also ensure that they have the means to go to court and to be effective once they get there.

Id. at 89-90 (Statement of Armand and Mary Frances Derfner, Lawyers' Committee for Civil Rights Under Law). Congressman Danielson of California, a member of the subcommittee, put it graphically:

> [T]here ought to be a balancing of the power in our court. It seems to be fundamentally unfair that one party is the Government with also unlimited resources, funds, personnel, availablity of records, availability of investigating personnel, and whatnot; on the other hand you have the private citizen. What was that thing twisting slowly in the wind? He is out there all alone anyway and it is chilly out there financially.

Id. at 61.[14/]

14/ Congress heard specific examples of this. There was

> the Prince Edward County [school desegregation] case, which was one of

Compounding this problem is the fact that, in addition to their already greater

14/ continued

> the serious instances of contemptuous violation of law, where schools were closed down, and where there were midnight raids on the treasury and where the Fourth Circuit with Judge Haynesworth [sic] sitting, among others, finally held this school board in contempt of court. We find in that case, which has gone on for nearly 15 years, there was only one phase during the entire case during which the plaintiffs' lawyers were awarded fees paid and that amounted to $19,000.
>
> During that same period, the school board lawyers, the county lawyers and the State's lawyers were getting their fees paid in full at all times.... [B]ut for the same period in which the plaintiffs' lawyers were awarded $19,000, the defendants paid their lawyers $150,000 for the service of having enabled them to go into contempt of court.
>
> As an old time civil rights lawyer said to me the other day, "the school boards pay their lawyers win, lose, or draw, day in and day out and yet we are on our own and we are to do the work of the Nation." That is really what this whole question is about.

Senate Hearings, supra, at 857 (Derfner Testimony).

resources, civil rights defendants are able to underwrite these extensive defenses with what is in fact public money. This is obvious in the case of governmental defendants, as in the instant case, who are paying litigation costs out of tax money -- including the taxes paid by plaintiffs and their families. In the case of corporations,

> public tax dollars are in a very real sense being used to support that litigation. The corporation's litigation expenses, its attorneys fees, it court costs and all costs connected with the litigation are deductible from the corporation's

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14/ continued

One of the plaintiffs' lawyers in that case testified before the House subcommittee. The defendants' final legal bill was between one-half and one million dollars. House Hearings, supra, at 153 (Testimony of Henry L. Marsh, III). He also noted that defendants in these cases "often persist in conduct of dubious legality and deliberately obstruct a prompt resolution of the case in the hope that in time the unpaid plaintiff's attorney will be unable or unwilling to bear the cost of continued litigation." Id. at 150.

> income tax. And that is win or lose, frivolous or nonfrivolous, meritorious or nonmeritorious. So you really have a built-in beginning that one side that is litigating the kind of issues I am talking about is already being supported by public funds.

Id. at 835-36 (Flannery Testimony). Accord, id. at 850 (Testimony of Joseph N. Onek, Director, Center for Law and Social Policy);[15/] id. at 861 (Derfner Statement); House Hearings, supra, at

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15/ Even fee shifting does not totally redress this imbalance, as he noted:

> Furthermore, the Government exercises no control over the expenses it will subsidize.If General Motors chooses to pay its lawyers $200 an hour the Government still pays one-half. If General Motors pays it lawyers to eat in the best restaurants and stay in the finest hotels, that is okay -- Uncle Sam is going to pay half of it, no questions asked. This is totally different from any kind of fee award system we might have. Under an attorneys' fee statute the courts would exercise control over attorneys' fees and other costs of litigation.

Id.

161 (Onek Statement).[16/]

These resources, including public funds, not only enable defendants to hire good lawyers, they enable them to obtain lawyers who are encouraged to litigate in a thorough and effective manner, "leaving no stone unturned" in presenting the very best defense for their clients. Contrasted with this is the very different manner in which public interest plaintiffs are forced to litigate, as described at the hearings.

> When a big case such as this comes into a private law firm, the way in which the law firm can organize is the way really that the courts are designed to handle these cases. Lawyers or teams of lawyers are formed to analyze the problem,

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16/ Corporate civil rights violators can also pass on the costs of their legal defense to the consumer. Senate Hearings, supra, at 861 (Derfner Statement). See also House Hearings, supra, at 171 (Testimony of Reuben B. Robertson, III, Public Citizens Litigation Group).

expert witnesses are contacted, fee arrangements are made so that the expert witness can give his full attention to the case during the time he is needed, research is undertaken in a variety of areas (even areas that are tangential to the lawsuit, just to make sure you have covered every aspect)....

Now, when a public interest law firm is involved, or when a group of citizens or even an individual citizen decides to take on a big case and to present the views of the other side in a big case, the contrast is really marked.

* * *

First of all, there is simply no money up front.... [T]here is very little money for such essential things as, for example, expert witnesses.

* * *

One result of what happens is that when a public interest lawyer litigates a big case, for self protection and to make sure that he has at least part of the case he can put on with confidence, he must scale down the issues. He looks at the enormous case and sees what little segment of the case can be litigated effectively, within the funds available.

As a result, the public interest lawyer must pare off very important issues -- that might even be winning

> issues -- simply because they are either too technical or too big, or require too much expenditure of money.

Senate Hearings, supra, at 832-34 (Testimony of Dennis Flannery). Accord, id. at 859 (Derfner Statement). (Civil rights lawyer "must also limit the time he can spend on those [cases] he can accept.").

B. The Legislative Response:

It was this precise testimony that Congress heeded when it considered and passed §1988.

> Representatives of the Lawyers Committee on Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing in the field testified to the devastating impact of the [Alyeska] case on litigation in the civil rights area.... The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling

> need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.

H.R. Rep., supra, at 2-3. [17/]

Congress's actions in a number of areas under §1988 reflect this policy to equalize the resources of the parties. For example, it adopted a different standard for fees to a prevailing defendant. See Hughes v. Rowe, 449 U.S. 5 (1980). In doing so, it noted that the defendants are usually governments: "Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves." H.R. Rep., supra, at 7.

17/ The Senate report acknowledged that this testimony "generally confirmed the record presented" at its hearings in 1973. S. Rep., supra, at 2.

Congress was concerned lest it "further widen the gap between citizens and government officials and ... exacerbate the inequality of litigating strength." Id.[18/] Similarly, it cited Swann, supra, which considered the fee "paid by the taxpayer for unsuccesful defense," 66 F.R.D. at 485, as a relevant factor in determining plaintiffs' counsel fees. S. Rep., supra, at 6.

18/ The House report also illustrates the fallacy of the argument made by amicus Equal Employment Advisory Council. It argues that plaintiffs should not receive fees for issues they do not win because, on those issues, the court is not "awarding them against a violator of federal law." Brief at 10, quoting Christiansburg Garment, supra, 434 U.S. at 418 (Title VII). Congress, however, did not adopt that rationale in §1988. It did not primarily view fee awards against defendants as a sanction for their bad acts. Rather, it emphasized that defendants are different "because they do 'not appear before the court cloaked in a mantle of public interest.'" H.R. Rep., supra, at 6, quoting United States Steel Corp. v. United States, 519 F.2d 359, 364 (3rd Cir. 1975).

The debates establish that the purpose of the Act was not simply to enable civil rights plaintiffs to obtain attorneys, but also to equalize the resources of the parties in these cases by providing civil rights lawyers with the same economic incentives to thoroughly prepare and effectively litigate their client's case as were already available to defendants' counsel. Senator Tunney, the author[19/] and initial sponsor[20/] of the legislation, noted in his final statement before the vote that resulted in passage that the bill "clearly intends to facilitate" as well as "encourage the bringing of actions...." 122 Cong. Rec. S. 17051 (daily ed. Sept. 29, 1976).

19/ See 122 Cong. Rec. S 16449 (daily ed. Sept. 22, 1976).

20/ See 122 Cong. Rec. S 17051 (daily ed. Sept. 29, 1976).

> Unless effective ways are found to provide equal legal resources, the Nation must expect its most basic and fundamental laws to be objectively repealed by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them. Attorneys' fees have proved one extremely effective way to provide these equal legal resources....
>
> When Congress calls upon citizens -- either explicitly or by construction of its statutes -- to go to court and vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court and to be effective once they get there.

Id.

Congress was aware that there are only two models of compensation available to motivate counsel. Traditional fee arrangements with "a fee-paying client" contemplate compensation "for all time reasonably expended on a matter." S. Rep., supra, at 6; Palmer, supra, 10 E.P.D. at 6130-31. See also cases cited, supra, at 12. The only other model of compensation is the contingent fee arrangement in personal injury cases.

Congress knew that the availability of contingent fees would help plaintiffs find counsel; it was working in the personal injury area. Senate Hearings, supra, at 797-98 (Testimony of J. Anthony Kline, Public Advocates, Inc.). But it also knew that the contingent fee it was providing in §1988 was not quite the same. House Hearings, supra, at 154 (Marsh Testimony); 122 Cong. Rec. S 17052 (daily ed. Sept. 28, 1976)(Statement of Senator Kennedy). In a personal injury case, the lawyer has an economic incentive to zealously press his client's case because his fee is directly proportional to the amount of the award. Civil rights cases, however, often involve nonpecuniary rights, S. Rep., supra, at 6, request only injunctive relief, House Hearings, supra, at 154 (Marsh Testimony); H.R. Rep., supra, at 9, or result in no damage award because of immunity

defenses available to officials. Id. Thus, with no large damage award from which to take fees, there is not the same economic incentive for counsel to fully press his client's interests.

Congress knew that traditional lawyers -- compensated by the hour win, lose or draw -- had every incentive to present their client's case effectively, "leaving no stone unturned." But compensating counsel only for time spent on winning issues would tend to motivate them only to take and press those of the client's claims that seemed reasonably sure of success. This would provide equal access to legal assistance, but not the equal legal resources which the testimony established was lacking and which Congress said it was providing. Civil rights plaintiffs' counsel could not research a point, develop an issue, or pursue a claim without risking

loss of compensation. This would defeat Congress's stated intention to "encourage" and "facilitate" civil rights claimants; it would render them ineffectively conservative in court.[21/] Congress therefore turned to the model provided by defendants' counsel and the experience under the "private attorney general" cases and the prior fee shifting statutes. In order to provide adversaries "roughly equal in preparation, roughly equal in skill," Congress adopted a hybrid; it made compensation contingent on "prevailing party" status but held out to prevailing plaintiffs' counsel that they would be compensated for all time "reasonably calculated to advance their clients' interests," Stanford Daily, supra, 64 F.R.D. at 684, "encouraging plaintiffs," as was already

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21/ This would also create a serious conflict of interest for the attorney. See discussion, infra, Point IV.

true of their adversaries, "to seek the broadest relief they feel, in good faith, that they are entitled to." Palmer, supra, 10 E.P.D. at 6130.

Thus, in deciding that counsel should be compensated for all time reasonably expended on a matter and rejecting the proportionality approach, Congress chose the only available model of compensation. It knew that the traditional fee model was providing high quality and effective representation to civil rights defendants; it adapted it to the prevailing civil rights plaintiff to achieve the same end.

III.

THE PROPORTIONALITY APPROACH IS AN UNWORKABLE WAY TO DETERMINE A REASONABLE COUNSEL'S FEE

Not only is the petitioners' approach a misreading of the Act; it is impractical

and would overburden both the trial and appellate courts with protracted counsel fee proceedings. It would require a prevailing party to spend as much or more time on the collateral fee question as on the merits of the case.[22/] As we show below, to require the district courts to proportion fee awards would be to open a veritable Pandora's Box.

First, courts would have to identify the extent to which issues were actually litigated and the amount of time spent on each. It would not be enough, as petitioners have done in their statement of the case, to compare the issues raised in the complaint with the outcome; the amount of

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22/ A number as courts of appeals have warned against this result and have fashioned appropriate rules to guard against it. See, e.g., Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980)(en banc).

time reasonably spent in a case may have no relationship to such a calculation. Some issues may drop out early in the litigation and others may be added as the case develops. The great part of an attorney's time may be spent on the central issue, with little or no time spent on subsidiary ones. A proportionate award could deny compensation for time reasonably spent on the issues on which plaintiff prevailed.

Further, even the initial division into different issues would be difficult and artificial. In an employment discrimination case, for example, the central issue may be promotional opportunities for minorities. Promotions, however, may be affected by a whole range of other personnel practices, including training, [23/]

23/ See, e.g., McKenzie v. McCormick, 425 F. Supp. 137, 140-41 (D.D.C. 1977).

performance appraisals,[24] work assignments,[25] or the composition of the supervisory work force.[26] Should the court fragment the promotion issue to determine whether training, for example, is "separate?" Even petitioners concede that counsel should not be deterred from pressing alternative theories of the case. Brief at 32.

Similarly, comparing the relief obtained to that requested would lead into an impenetrable morass. A complaint will often request a variety of possible types of relief, as well as other relief "that may be just and proper." Or, a party may

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24/ See, e.g., McKenzie v. Saylor, 508 F. Supp. 641, 650-51 (D.D.C. 1981).

25/ See, e.g., Segar v. Civiletti, 508 F. Supp. 690, 713 (D.D.C. 1981).

26/ See, e.g., Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 824 (5th Cir. 1982).

simply request relief in general terms with specifics to await subsequent proceedings after liability has been established, an approach often taken in complex civil rights litigation involving such issues as institutional conditions[27/] or employment discrimination. Indeed, the appropriate scope of relief may only develop as the case is litigated; a party may wind up with relief far different than that prayed for, but which indeed establishes him as the winning party. Congress recognized that "courts should not require attorneys ... to divine the exact parameters of the court's willingness to grant relief."

27/ This is particularly true in institutional cases where this Court's opinions counsel deference to state administrators. See, e.g., Bell v. Wolfish, 441 U.S. 520 (1979). Remedial decrees are often the result of further hearings after the defendants have had an opportunity to submit plans for compliance. See, e.g., Spates v. Manson, 619 F.2d 204 (2d Cir. 1980).

Stanford Daily, supra, 64 F.R.D. at 684. For courts to relate the final relief to the various issues, the relief originally sought, or the way time was spent would be an equally difficult, complex, and pointless exercise.

Issues in complex litigation, including civil rights litigation, are often interlapping, intertwining, and interdependent. Individual items of proof or a witness's testimony may relate to a variety of questions. To complement statistical proof in an employment case, for example,[28/] individual class members will often testify as to a variety of experiences ranging over a number of employment practices.[29/] Similarly, as

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28/ See, e.g., Teamsters v. United States, 431 U.S. 324 (1977)

29/ See, e.g., Segar, supra, 508 F. Supp. at 702-03.

in this case, institutional litigation will involve testimony by the same witness on a variety of problems and conditions.[30/] At the end of this process a court may very well find violations with regard to some but not all of these problems and conditions. The notion of trying to distribute attorneys' time spent on witness preparation and direct examination between fragmented aspects of the case borders on the bizarre. No attorney in private practice would even consider billing a client on such a basis. Northcross, supra, 611 F.2d at 636; Allen v. Terminal Transport, surpa, 486 F. Supp. at 1201; Palmer, supra, 10 E.P.D. at 6130-31.

The net result of petitioners' arguments would be both a vast burden on judicial resources and an increase in

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30/ See, e.g., Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc).

costs to defendants. The courts would be burdened with complex factual determinations regarding which hours were spent on which issues and how to distinguish time spent on interrelated tasks. Defendants would spend as much or more on opposing counsels fees for this process.[31/]

Finally, adoption of a rule requiring the apportionment of fees to the extent a party prevails would create an intractable ethical dilemma for civil rights attorneys. As discussed in Point II., supra, all other attorneys have an economic incentive to present their client's case in a zealous and effective fashion. If fees in civil rights cases were proportioned to the issues won,

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31/ It is well established that time spent in litigating counsel fee issues is itself compensable. See, e.g., Copeland, supra, 641 F.2d at 876; Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970).

an attorney's economic self-interest would counsel him to only press those of the client's claims that were sure winners or had a strong possibility of success; it would dictate that he drop those claims which, although important to the client, may only be "supportable by a good faith argument for an extension, modification or reversal of the law." EC 7-4, ABA CODE OF PROFESSIONAL RESPONSIBILITY.[32/] This would put his interests in conflict with those of his client, who is entitled to a lawyer who will represent him zealously.

32/ This dilemma will particularly be true in civil rights cases where:

> The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes.

Id. at EC 7-2.

Canon 7, ABA CODE, supra.[33/]

The conflict of interest inherent in the proportionality approach would place the lawyer in violation of Canon 5, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client," which requires him to exercise his "professional judgment ... free of compromising influences and loyalties." EC 5-1, ABA CODE, supra.[34/] Indeed, under EC 5-2,

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33/ Indeed, DR 7-101(A)(1) provides:

> A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law....

Id.

34/ To protect himself, a lawyer would have to resolve the conflict by raising every issue. Otherwise, were he to properly exercise his professional judgment and drop weak or unsupportable claims, see DR 7-101(B)(1), he would be opening himself to charges that he was motivated by his economic self-interest, subjecting both himself and the legal system to condem-

the potential conflict would require the lawyer to decline representation. Thus, the proportionality approach would subvert Congress's fundamental objective in passing § 1988: "to attract competent counsel." S. Rep., supra, at 6; H.R. Rep., supra, at 9.

IV.

THE RULES REQUIRED BY THE LEGISLATIVE HISTORY PROPERLY BALANCE THE NEED TO ADEQUATELY COMPENSATE COUNSEL AND EQUALIZE RESOURCES WITH THE NEED TO PREVENT ABUSES

The rules adopted by Congress give counts ample authority to prevent abuses. Thus, both the Fifth and Sixth Circuits, in close adherence to the preexisting case law

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34/ continued

nation in violation of Canon 9. "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." See generally EC 9-2. Adopting the proportionality approach might thus have the unexpected result of preventing lawyers from narrowing issues.

adopted by the Act, have held that time spent on clearly meritless or frivolous issues will not be compensated. Compare Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc), and Northcross v. Bd. of Ed. of Memphis City Schools, 611 F.2d 624, 636 (6th Cir. 1979), with Locklin, supra, 429 F.2d at 879.[35/]

The well developed body of pre-Act cases which was incorporated in § 1988 establishes the parameters for determining awards in cases where plaintiffs have prevailed on less than all issues. Where plaintiff has prevailed on the liability question but does not obtain relief that is as complete or speedy as requested, he should still receive fees for all time reasonably expended. See, e.g., Fairly

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35/ This rule is consistent with the standards set by the Court in Christiansburg Garment, supra.

supra; Wade v. Mississippi Cooperative, supra; United States v. Operating Engineers, supra; Bradley, supra, discussed at pp. 12-15, supra. Similarly, as petitioners concede, Brief at 32, work done on alternative theories supporting the same claim for relief should be compensated whether the court declines to reach the alternative theory, Locklin, supra (unnecessary in hindsight but not manufactured), or rejects it. Lewis v. Pennington, supra.

Where plaintiff prevails on some but not all of his claims, he should ordinarily receive full fees. See, e.g., Palmer, supra, 10 E.P.D. at 6130-31 (plaintiff won only one of eight counts); Watkins, supra, 530 F.2d at 1198 & n.53 (fees to individual plaintiff denied relief where prevailed on majority of class claims); Davis, supra, 8 E.P.D. at 5049. The controlling analysis -- applied by the

lower courts in this case -- is whether plaintiff has prevailed on the central issue, see Parker, supra, 411 F. Supp. at 1063-64, or whether he has achieved a "significant" or "excellent" result. Operating Engineers, supra, 6 E.P.D. at 6034; Davis, supra, 8 E.P.D. at 5049.[36/]

These rules accommodate for the complexities of litigation. An attorney may press individual claims or motions that are not successful but may still ultimately vindicate his client's interests.

36/ In contrast, when the plaintiff prevails on only a minor or peripheral issue courts may reduce the award. The Act only provides for fees for time "reasonably expended." S. Rep., supra, at 6. Thus, amici States are correct that in applying the Johnson v. Georgia Highway Express standards, adopted by both houses as the proper standards, S. Rep., supra, at 6; H.R. Rep., supra, at 8, a court should properly look to Johnson factor number eight: the results obtained. But this is precisely the standard applied by the district court in this case. Having applied the very standard approved by the legislative history, it should be affirmed.

In that context, he should not be penalized for representing his client vigorously and effectively as contemplated by both the canons and the Congress that passed the Act. On the other hand, when counsel's efforts bring success on only a minor or peripheral point, a court may properly reduce the award.[37/]

37/ Under the Johnson standards as applied by the majority of the courts on appeal, all time reasonably expended should be included in the initial calculation or "lodestar." The court would then consider whether the results obtained warrant any adjustment -- either upward or downward -- to arrive at a total fee. See Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980); City of Detroit v. Ginnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Bros. Builders, Inc. v. American R. & S. San. Corp., 487 F.2d 161 (3rd Cir. 1973); Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981); Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 583 (5th Cir. 1980); Grunin v. Int'l House of Pancakes, 513 F.2d 114 (8th Cir. 1975) & Cleverly v. Western Electric Co., 594 F.2d 638, 642 (8th Cir. 1979), aff'g 450 F. Supp. 507 (W.D. Mo. 1978); Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), aff'g 64 F.R.D. 680 (N.D. Cal. 1974); Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 332 (11th Cir. 1982); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)(en banc).

At the same time, a court cannot merely "second guess" counsel for zealous representation which a client would welcome without defeating the objectives of the Act. Northcross, supra, 611 F.2d at 636. Compare, n. 15, supra. Congress was aware that, under the Act, when a lawyer wins a case "his rate of compensation is fixed not by a grateful client, but by a disinterested judge." 122 Cong. Rec. S 17052 (daily ed. Sept. 19, 1976) (Statement of Senator Kennedy). Accordingly, it admonished courts not to supplant their judgment for the attorney's, any more than a client would fail to pay "for all time reasonably expended on a matter." S. Rep., supra, at 6. A court may not make arbitrary reductions under the rubric of "results obtained;" it must identify any work it truly believes unreasonable and explain any downward adjustments in order to make

appellate review meaningful. See Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 332 (11th Cir. 1982).

CONCLUSION

These standards, established by the legislative history, will not result in windfalls as the committee reports used that term -- they are the very standards applied in the cases Congress said resulted in adequate fees that were not windfalls. S. Rep., supra, at 6. The "sound public policy" advanced by petitioners and their amici is really a defendant's policy: to limit the ability of plaintiffs to present their case and force them to narrow the issues to only the clearest and most flagrant violations. But Congress enacted §1988 precisely because plaintiffs were being forced to narrow issues. It did so to give form to a very different policy: to

equalize the litigating strength of the parties and enable plaintiffs to present their cases in as thorough and effective a manner as defendants. It is that "sound public policy" which this Court must confirm.

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

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No. 81-1244

In the Supreme Court of the United States

October Term, 1982

C. DUANE HENSLEY, JAMES K. RITTERBUSCH, HENRY BRATKOWSKI, EDWARD TELLEZ, and the current members of the Missouri Mental Health Commission,
Petitioners

v.

THOMAS ECKERHART, RONALD AMBACH, ROMMIE JONES, MICHAEL O'BRADOVICH, and WILL LESTER THIGPEN, for themselves and all other persons similarly situated,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF ON BEHALF OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN and WYOMING, AMICI CURIAE

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(Continued on Inside Back Cover)

QUESTION PRESENTED

Whether, in a case in which plaintiffs have prevailed only on a portion of their claims, an award of attorney's fees made pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, should accurately reflect the results of the litigation, including the extent to which plaintiffs have prevailed on the merits of their claims.

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INTEREST OF THE AMICI CURIAE

This case requires the Court to decide whether plaintiffs who prevail only to a limited extent on their claims are entitled to attorney's fees for all hours spent in litigation of the case, or only for that portion of the time devoted to successful claims. The *amici* states, their officers and employes with increasing frequency are called upon to defend civil rights actions in which plaintiffs assert a variety of legal claims based on a plethora of legal theories. In many of these cases, after protracted litigation, the plaintiffs succeed in obtaining only a portion of the requested relief. Under the standards applied by the district court in this case, and endorsed by the Eighth Circuit in this and other cases,[1] the defendants are liable for attorney's fees attributable to the litigation of the entire case, including the time spent in advancing those claims on which the defendants have prevailed.

The *amici*, who, by virtue of their public duties to operate multifarious communal programs and institutions, continually are faced with civil rights litigation involving many claims and legal theories, have a substantial interest in the resolution of the question presented in this case.

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[1] See *Reproductive Health Services v. Freeman*, 614 F.2d 585, 600 (C.A. 8 1980), *vacated on other grounds*, 449 U.S. 809 (1980); *Crain v. City of Mountain Home, Arkansas*, 611 F.2d 726, 729 n. 7 (C.A. 8 1979); *Brown v. Bathke*, 588 F.2d 634, 637 (C.A. 8 1978).

SUMMARY OF ARGUMENT

A. The purpose of the Attorney's Fees Act is to encourage competent counsel to pursue civil rights litigation without providing windfalls for attorneys. Moreover, Congress has determined that this purpose is served by providing for awards of fees to litigants only if they prevail on the merits. Both the basic framework of Section 1988 and its legislative history demonstrate that the results of the litigation is an important factor to be considered in calculating a reasonable attorney's fee.

B. The only objective standard for assessing the results of the litigation and the only such method consistent with the purposes of Section 1988 is one which permits prevailing plaintiffs to recover fees only for services rendered in connection with the litigation of successful claims. The approach followed by the courts below in this case grants unbridled discretion to the judge who is setting the fees. A purely mathematical approach gives insufficient attention to the varying importance of different claims.

The "prevailing claim" rule which *amici* urge has the advantage of encouraging the joinder of various civil rights claims in a single lawsuit wthout unduly penalizing defendants who may have violated plaintiff's constitutional rights, but not to the extent originally claimed by plaintiff. The "prevailing claim" rule is consistent with the statute and its legislative history; it is the only logical approach if attorney's fees are to be awarded in a rational manner.

ARGUMENT

Calculation of a Reasonable Attorney's Fee for a Prevailing Plaintiff Pursuant to 42 U.S.C. Sec. 1988 Requires That the Court Consider the Extent to Which the Plaintiff Has Prevailed and Award Fees Only for Those Efforts of Counsel Devoted to the Claims on Which the Plaintiff Prevailed

A. In determining a reasonable attorney's fee, the court should take into consideration the results achieved by the prevailing Plaintiff.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, permits the court, in its discretion, to allow the prevailing party a reasonable attorney's fee in actions brought pursuant to 42 U.S.C. §1983 and other civil rights statutes.[2] Section 1988 does not itself define "reasonable attorney's fees." Similarly, the available legislative history[3] does not explicitly set forth guidelines for determining reasonable fees, nor do the legislative materials address the specific question presented in this case. Nevertheless, a review of House and Senate Reports which accompanied Section 1988 provide important clues for its proper interpretation.

The primary purpose of Congress in providing for recovery of reasonable attorney's fees was "to attract competent counsel in cases involving civil and constitutional

[2] Section 1988 also applies to actions under 42 U.S.C. §§1981, 1982, 1985, 1986, 2002d *et seq.*, and 20 U.S.C. §§1681-1686.

[3] H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976); S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976).

rights, while avoiding windfalls to attorneys." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) 9. See also S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) 6. Generally, Congress intended that standards which previously had been developed by the courts for setting fees in antitrust cases and other types of complex litigation should be utilized for determining fees in civil rights cases. S. Rep. 94-1011, *supra,* at 6. Specific reference was made in both the House and Senate Reports to the guidelines for fee determination set forth in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (C.A. 5 1974).[4] H.R. Rep. 94-1558, *supra,* at 8; S. Rep. 94-1011, *supra,* at 6.

The Fifth Circuit in *Johnson,* drawing on the standards for determination of counsel fees prescribed by the American Bar Association's Code of Professional Responsibility, E.C. 2-18, D.R. 2-106, listed twelve factors which should be considered in calculating a reasonable attorney's fee. One of the factors[5] which the Court endorsed was "the amount involved and the *results obtained*" in the litigation. *Johnson, supra,* 488 F.2d at 718 (emphasis supplied).

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[4] *Johnson* was an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* "It is intended that the standards for awarding attorney's fees [under Section 1988] be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. 94-1011, *supra,* at 5.

[5] The other factors are as follows: time and labor required; novelty and difficulty of the questions; skill requisite to perform the legal services properly; preclusion of other employment; customary fee; time limitations; experience, reputation and ability of the attorney; undesirability of the case; nature and length of the professional relationship with the client; and, awards in similar cases. *Johnson, supra,* 488 F.2d at 717-719.

Consideration of the results achieved by counsel when calculating a reasonable fee is consistent with the basic thrust of Section 1988. Attorney's fees are not available for all civil rights plaintiffs—fees are to be awarded to plaintiffs only if they prevail. 42 U.S.C. §1988. So at the threshold level, application of Section 1988 is intimately tied to the results of the litigation. This limitation on the availability of attorney's fees reflects a congressional judgment that relaxation of the normal rule requiring each party to pay his or her attorney is justified only when the plaintiff has succeeded in promoting enforcement of the civil rights laws. This purpose clearly would be thwarted if plaintiffs were permitted to collect substantial counsel fees irrespective of the contribution which the litigation has made toward the vindication of the plaintiff's civil rights.

Of course, it must be emphasized that defendants are liable for fees assessed under Section 1988. To penalize a defendant and reward a plaintiff for the full cost of litigation when the case may have been settled largely in defendant's favor would enrich the plaintiff unjustly.

Each of the courts of appeals, to some extent, has held that the results of the litigation should be considered in calculation of attorney's fees.[6] In another

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[6] See *Copeland v. Marshall*, 641 F.2d 880 (C.A.D.C. 1980) (en banc); *Lamphere v. Brown University*, 610 F.2d 46 (C.A. 1 1979); *Nadeau v. Helgemoe*, 581 F.2d 275 (C.A. 1 1978); *Detroit v. Grinnell Corp.*, 495 F.2d 448 (C.A. 2 1974); *Hughes v. Repko*, 578 F.2d 483 (C.A. 3 1978); *Frith v. Eastern Airlines, Inc.*, 611 F.2d 950 (C.A. 4 1979); *Jones v. Diamond*, 636 F.2d 1364 (C.A. 5 1981) (en banc), *cert. dismissed sub nom., Ledbetter v. Jones*, 102 S.Ct. 27 (1981); *Northcross v. Board of Education of Memphis*, 611 F.2d 624 (C.A. 6 1979), *cert. denied*, 477 U.S. 911

context,[7] this Court implicitly recognized the need to gear counsel fees to the results obtained by approving an award of fees to plaintiffs for successfully establishing liability while reserving the right to award additional fees if substantial damages were established. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970).[8]

B. Prevailing Plaintiffs are entitled to attorney's fees only for litigation of claims on which they have prevailed.

There seems to be no disagreement among the lower courts that the results achieved should have some bearing on attorney's fees. The legislative history of Section 1988 supports that view and respondents do not appear to contest the point. The question then is whether the language in Section 1988, its legislative history or logic compel that prevailing plaintiffs receive counsel fees for all hours spent on the litigation, or, as the *amici* suggest, that fees are available only for the litigation on prevailing claims.

The opinion of the district court in this case typifies an approach which gives the court unbridled discretion to attach whatever weight it chooses to the results of the litigation. Although the Eighth Circuit has reminded the district courts to consider "[t]he degree of a plaintiff's suc-

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(1980); *Muscare v. Quinn*, 614 F.2d 577 (C.A. 7 1980); *Brown v. Bathke*, 588 F.2d 634 (C.A. 8 1978); *Bartholomew v. Watson*, 665 F.2d 910 (C.A. 9 1982); *Gurule v. Wilson*, 635 F.2d 782 (C.A. 10 1980) (opinion on rehearing).

[7] *Mills* was a common benefit case in which shareholders succeeded in overturning a corporate merger.

[8] *Mills* is cited with approval in the legislative history of Section 1988. S. Rep. No. 94-1011, *supra*, at 5; H.R. Rep. No. 94-1558, *supra*, at 8.

cess . . . in gauging the amount of the attorney's fee,"[9] it has offered no positive guidance on how the degree of success is to be objectively evaluated and translated into an award of fees. In considering the results obtained by respondents in this case, the district court merely summarized the results on the merits and concluded that "[t]he extent of this relief clearly justifies the award of a reasonable attorney's fee" (Pet. App. 16). This conclusion, which was affirmed by the Court of appeals (Pet. App. 1-2), offers no suggestion of its underlying rationale and provides no basis for an appellate court or the litigants to determine whether and to what extent the results achieved had an effect on the fees awarded.[10]

At the other end of the spectrum from the purely discretionary approach applied by the lower courts in this case, is a simple mathematical calculation which requires the court to arrive at a ratio which reflects the proportion of claims in which plaintiff has prevailed to the total number of claims. The district court apparently believed that petitioners were advancing such a mathematical standard (Pet. App. 7). As the court observed, that method is defective for failing to give appropriate consideration to such factors as "the relative importance of various issues and the interrelation of the issues" (Pet. App. 7-8).

Faced with the need to provide some structured guidance[11] to the district courts in the application of the *John-*

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[9] *Oldham v. Ehrlich*, 617 F.2d 163, 168 n.9 (C.A. 8 1980).

[10] See also *Kamberos v. GTE Automatic Electric, Inc.*, 603 F. 2d 498, 604 (C.A. 7 1979), *cert. denied*, 102 S.Ct. 612 (1981) (consideration of results without explanation of how results effected award of fees).

[11] This Court has rejected a purely subjective standard for determining a plaintiff's right to attorney's fees in the first in-

son[12] standards and the inflexibility of methods such as the strict mathematical proportioning of hours, a number of courts of appeals have adopted the "lodestar" approach "as the only logical method of fee computation." Larson, *Federal Court Awards of Attorney's Fees* (1981) 120. First outlined by the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.*,[13] 540 F.2d 102 (1976) (en banc), the lodestar method places primary emphasis upon the "amount of time reasonably expended on the matter multiplied by a reasonable hourly rate." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 365 n.3 (1981) (Powell, J., concurring in the result). Adjustments to the lodestar are made based upon additional factors akin to those outlined in *Johnson*.[14]

The lodestar method of fee calculation has considerable advantages over the purely discretionary application of the *Johnson* factors applied by the courts below in this case. "Simply to articulate those twelve factors . . . does

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stance. *Newman v. Piggie Pack Enterprises, Inc.*, 390 U.S. 400 (1968).

[12] *Johnson v. Georgia Highway Express, Inc.*, *supra*.

[13] *Lindy* was an antitrust case in which attorney's fees were sought under the common fund theory. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 257, 258 (1975). The legislative history of Section 1988 recommends that standards developed in other types of litigation "such as antitrust cases" should be utilized. S. Rep. 94-1011, *supra*, at 6.

[14] See, e.g., *Copeland v. Marshall*, 641 F.2d 880 (C.A.D.C. 1980) (en banc); *Cohen v. West Haven Board of Police Commissioners*, 638 F.2d 496 (C.A. 2 1980); *Furtado v. Bishop*, 635 F.2d 915 (C.A. 1 1980); *Muscare v. Quinn*, 614 F.2d 577 (C.A. 7 1980); *Northcross v. Board of Education of Memphis*, 611 F.2d 624 (C.A. 6 1979), *cert denied*, 447 U.S. 911 (1980); *Prandini v. National Tea Co.*, 557 F.2d 1015 (C.A. 3 1977); *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (C.A. 3 1975); *Detroit v. Grinnell Corp.*, 495 F.2d 448 (C.A. 2 1974).

not itself conjure up a reasonable dollar figure in the mind of a district court judge." *Copeland v. Marshall*, 641 F.2d 880, 890 (C.A.D.C. 1980) (en banc). See also Berger, Court Awarded Attorney's Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 286-287 (1977). The lodestar method has the advantage of providing a structure for evaluation of the factors which have been identified as bearing on the determination of a reasonable attorney's fee. Nevertheless, because the origin and purpose of attorney's fee awards in antitrust, common fund cases (the context in which the lodestar approach was developed) differs markedly from the purposes sought to be furthered by fee awards in civil rights cases,[15] adjustments became necessary.

The most fundamental refinement of the lodestar approach (and the one pertinent to this case) has been the limitation of compensable hours to those services performed in the litigation of claims upon which the plaintiff has prevailed. See *Hughes v. Repko*, 578 F.2d 483, 486-487 (C.A. 3 1978). In *Hughes*, the Third Circuit opined that only by awarding fees for those hours spent on prevailing claims could a court "apply the 'prevailing party' language of [Section 1988] fairly." *Id.*, at 486. *Amici* agree.

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[15] For example, the purpose of fee awards in common fund cases is to prevent unjust enrichment of third parties who are benefited by the decision, *Trustees v. Greenough*, 105 U.S. 527 (1881); attorney's fees are awarded in civil rights cases to promote enforcement of certain statutes. See *Newman v. Piggie Pack Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1988 authorizes awards of attorney's fees to the prevailing plaintiff at the expense of defendants, in addition to any damages; in common fund cases, the fees go directly to the attorneys and are taken from fund established by the action. See *Central Railroad and Banking Co. v. Pettus*, 113 U.S. 116 (1885).

The rationale underlying the *Hughes* refinement is implicit, but obvious. The rules in federal court permit liberal joinder of claims. See Advisory Committee's Notes on Fed. R.Civ.P. 18; 3A Moore, Federal Practice ¶18.04, at 18-13 (1982). A party may assert against his opponent all claims he may have against that party. Rule 18(a), Fed. R.Civ.P. A liberal joinder policy serves the important purpose of promoting judicial economy. Nevertheless, the liberal joinder policy of the federal rules has an adverse impact on the policies underlying Section 1988 if awards of attorney's fees are made for claims upon which the plaintiff has not prevailed.

Absent the "prevailing claim" rule advanced by the *amici* here, the amount of fees awarded, if any, for a particular claim will depend upon the fortuity of its being joined with a successful claim. For example, assume that inmates of a correctional institution bring a civil rights action in which they allege that two distinct policies of prison officials, the opening of incoming mail and the housing of three inmates in a cell, violate their constitutional rights. Under the Eighth Circuit standard, if the inmates prevail on the mail issue, but lose the triple-bunking issue, they will recover fees for all time reasonably spent on all litigation. If, however, the two claims are the subject of separate lawsuits, the plaintiffs are entitled to attorney's fees only for the claim on which they prevailed.

The potential for abuse of the Eighth Circuit rule is apparent. Putting aside patently frivolous claims,[16] plain-

[16] Even the Eighth Circuit would deny attorney's fees for litigation of frivolous claims. See *Brown v. Bathke*, 588 F.2d 634 (C.A. 8 1978).

tiffs are encouraged to take a "kitchen sink" approach to litigation. There is no barrier and, in fact, there is an incentive for plaintiff's counsel to throw into a civil rights action every conceivable complaint the plaintiff may have with a particular government institution or program. So long as one claim is upheld, attorney's fees are recoverable for all services performed and plaintiff stands no loss.

That this result is at odds with the purpose and spirit of Section 1988 is readily discernible. The purpose of Section 1988 is to encourage enforcement of the civil rights laws, not to encourage litigation to be as all-consuming as possible. The aim in providing attorney's fees for successful civil rights plaintiffs is to equalize the ability of all persons to vindicate their civil rights, not to set up plantiffs' attorneys as roving commissions to review each nook and cranny of government operations in the hope of finding at least one civil rights violation. Section 1988 clearly was not intended to encourage plaintiffs' attorneys to draft lawsuits as broadly as possible by providing compensation so long as one claim is successful. If Section 1988 is applied as the Eighth Circuit recommends, it would produce for plaintiff's attorneys the windfalls which Congress has counseled should be guarded against. See S. Rep. 94-1011, *supra*, at 6; H.R. Rep. 94-1558, *supra*, at 9.

Quite apart from its consistency with the language and purpose of Section 1988, the "prevailing claim" rule logically is the best barometer of the results the plaintiff has achieved. Generally, it is logical to assume that the number of hours spent by an attorney on a particular task will vary with the difficulty and importance of the legal claim. By taking proper account of the relative importance of various claims, the "prevailing claim" standard is

vastly superior to any strictly mathematical approach. On the other hand, this objective standard for gauging the results of litigation, unlike the purely discretionary standard followed by the courts below, will help to insure some degree of uniformity in awards of attorney's fees.

The majority of the courts of appeals which have definitively decided the issue[17] have endorsed the rule which permits attorney's fees only for those claims upon which the plaintiff has prevailed.[18] The Eighth Circuit, in rejecting the "prevailing claim" rule, has relied upon references in the legislative history of Section 1988 to cases such as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and, *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), for the proposition that attorney's fees should be

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[17] See *Copeland v. Marshall*, 641 F.2d 880, 891-892 (C.A.D.C. 1980) (en banc); *Lamphere v. Brown University*, 610 F.2d 46, 47 (C.A. 1 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (C.A. 1 1978); *Hughes v. Repko*, 578 F.2d 483, 486-487 (C.A. 3 1978); *Bartholomew v. Watson*, 665 F.2d 910, 914 (C.A. 9, 1982); *Gurule v. Wilson*, 635 F.2d 782, 794 (C.A. 10 1980) (opinion on rehearing). The Second and Fourth Circuits have not ruled on the issue. The Fifth Circuit's position is ambiguous. See *Jones v. Diamond*, 636 F.2d 1364, 1382 (C.A. 5 1981) (en banc) *cert. dismissed sub nom. Ledbetter v. Jones*, 102 S.Ct. 27 (1981). Panels of the Seventh Circuit have reached conflicting results. Compare *Muscare v. Quinn*, 614 F.2d 577, 579-581 (C.A. 7 1980) (award of fees for successful claims), with *Sherkow v. State of Wisconsin*, 630 F.2d 498, 504-505 (C.A. 7 1980) (fees awarded for time spent on all claims whether or not successful).

[18] This is the English rule as well. See *Reid, Hewitt and Co. v. Joseph*, [1918] A.C. 717; Jackson, The Machinery of Justice in England (1964) 296 n.1.

awarded for all hours spent on the case. See *Brown v. Bathke*, 588 F.2d 634, 636-637 (C.A. 8 1978).[19] This reliance is misplaced.

The Senate Report provides as follows:

> It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases *and not be reduced because the rights involved may be non-pecuniary in nature.* The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reason-

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[19] The Sixth Circuit has also refused to follow the "prevailing claim" rule. See *Northcross v. Board of Education of Memphis*, 611 F.2d 624, 636 (C.A. 6 1979), *cert. denied* 447 U.S. 911 (1980). *Northcross* is based upon that portion of the legislative history which refers to "traditional" methods of compensation and the court's conclusion that "[w]e know of no 'traditional' method of billing whereby an attorney offers a discount based upon his failure to prevail on" certain claims. *Id.*, at 636. Of course the A.B.A.'s Code of Professional Responsibility prescribes that results of the litigation are to be taken into account when setting a fee. E.C. 2-18, D.R. 2-106.

> ably expended on a matter.' *Davis, supra; Stanford Daily, supra,* at 684.

S. Rep. 94-1011, *supra,* at 6 (emphasis supplied). It is clear from the context in which *Zurcher, Davis* and *Swann* appear in the legislative history that they were cited for the proposition that vindication of rights not accompanied by a damage award should result in an award of fees. In fact, each of those cases involved clear victories for the plaintiffs, although no monetary relief was awarded in any of them. No mention is made in the legislative history of the "prevailing claim" issue and it stretches credulity to conclude that Congress intended to endorse every facet and nuance of the opinions cited.

Moreover, as has been pointed out earlier, a construction of Section 1988 which permits recovery of attorney's fees for time spent on unsuccessful claims conflicts with the purpose of the statute and other portions of the legislative history. Plaintiffs properly are permitted to recover attorney's fees when they successfully vindicate their civil rights and the erring defendants rightfully are required to bear the cost of remedying their transgressions. The entire statutory scheme is turned upon its head if plaintiffs are permitted to benefit, and defendants to suffer, when there has been no constitutional violation.

The Eighth Circuit in this case applied incorrect standards for determination of attorney's fees under 42 U.S.C. §1988. It is impossible to determine from the record the amount of time spent by respondents' counsel on successful and unsuccessful claims. Accordingly, the case should be remanded for findings of fact necessary to apply the proper standards.

CONCLUSION

The case should be remanded for proceedings to determine the services provided by plaintiffs' attorney in the litigation of successful claims.

Respectfully submitted,

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Docket Sheet

NO. 81-1244-CFX	TITLE C. Duane HENSLEY, et al., Petitioners v. Thomas Eckerhart, et al.

DOCKETED	COURT
Dec, 24. 1981	United States Court of Appeals for the Eighth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Michael L. Boicourt
	Counsel for Respondents: Stanley J. Eichner
Dec. 24, 1981	Petition for writ of certiorari filed. (Record filed)
Feb. 5, 1982	Brief for the respondents in opposition filed.
Feb. 10, 1982	DISTRIBUTED. 2-26.
Mar. 1, 1982	Petition for writ of certiorari GRANTED.

Apr. 14, 1982	Order extending time to file the petitioners' brief on the merits until May 8, 1982.
Apr. 17, 1982	Joint appendix filed.
May 10, 1982	Brief for the petitioners filed.
May 10, 1982	Brief, amicus curiae, of The Equal Employment Advisory Council in support of petitioners filed.
May 10, 1982	Brief, amici curiae, of Pennsylvania, Alabama, Alaska, et al filed.
May 26, 1982	Order extending time to file the respondents' brief on the merits until June 22, 1982.
June 22, 1982	Brief, amicus curiae, of The American Bar Association filed.
June 24, 1982	Brief, amici curiae, for the NAACP Legal Defense and Educational Fund, Inc. et al. filed.
June 24, 1982	Brief for the Respondents filed.
Aug. 25, 1982	CIRCULATED.
Nov. 3, 1982	ARGUED.